

No. 12514

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United States  
Court of Appeals  
For the Ninth Circuit.

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ORESTUS CAVNESS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record  
In Two Volumes  
Volume II  
(Pages 331 to 622)

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Appeal from the United States District Court  
District of Hawaii.

FILED

JUL 10 1950









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Appeal from the United States District Court  
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GILBERT J. CARR

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Please state your name.

The Witness: Gilbert J. Carr.

The Court: Age?

The Witness: Forty-three.

The Court: Occupation?

The Witness: U. S. Customs Chemist.

The Court: Do you live here in Honolulu?

The Witness: Kailua.

The Court: You are a citizen of the United States?

The Witness: Yes.

The Court: Exclusively?

The Witness: Yes.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Carr, how old are you?

A. Forty-three.

Q. Did you go to college?

A. Graduated from University of Chicago, Bachelor of Science degree, major in chemistry.

Q. University of what? A. Chicago.

Q. When did you graduate from the University of Chicago?

A. 1943. Received my degree in 1943.

(Testimony of Gilbert J. Carr.)

Q. When did you first start studying for your degree? A. Oh, it was about 1927.

Q. And during that entire period in what subject did you major? A. In chemistry.

Q. Did you do any work in chemistry during that period?

A. Yes, I was working in the Government laboratory at the time.

Q. Which laboratory?

A. Bureau of Internal Revenue, Alcohol Tax Unit.

Q. What was your work there?

A. Assistant chemist, chemical laboratory.

Q. What type of work did you do?

A. Assisting the chemists in analyzing all kinds of liquors, narcotics, perfumes, alcohols.

Q. Did you familiarize yourself with the standard tests for the analysis of narcotics?

A. Yes, I did.

Q. After 1943 what did you do?

A. Well, in 1937 I was in charge in the laboratory in San Juan, Puerto Rico. In 1941 I came back to Chicago. [76]

Q. What kind of a laboratory was that?

A. Same kind of a laboratory, Alcohol Tax Unit, analyzing narcotics, perfumes. I was transferred back to Chicago in 1941 as an assistant chemist, still with the Alcohol Tax Unit, same type of work.

In 1948 I went to Oakland, California as a chemist for the United States Customs Laboratory. Cus-

(Testimony of Gilbert J. Carr.)

toms laboratories are a little more varied, all types of works, including narcotics and liquors. Then in 1949, January, I came here as chemist in charge.

Q. What type of work have you been doing here?

A. Most everything that is imported into the Islands of a chemical nature is analyzed by the laboratory. Work is also done for the various enforcement agents, including the Bureau of Narcotics of the Treasury Department.

Q. Have you analyzed narcotics in the course of your duties here in Honolulu?

A. Yes, I have.

Q. And what type of narcotics have you analyzed?

A. Practically all types, morphine, heroin, marijuana, various kinds of medicines. All suspected narcotics have to go through the entire procedure, whether they are there or not.

Q. How about the derivatives of cocoa leaves?

A. Yes, cocaine. [77]

Q. What is cocaine?

A. Cocaine is derived from the leaves of the cocoa plant.

Q. Do you know the process by which it is derived?      A. No, I don't.

Q. What is the test used by chemists in analyzing cocaine?

A. There is one specific test used, chloroplatinic acid, that gives characteristic crystals under the microscope, which can be identified. No other substance up to this particular time gives identically the same crystals.

(Testimony of Gilbert J. Carr.)

Q. Have you ever analyzed any narcotics or any substances for Mr. Wells? A. Yes, I have.

Q. And have you done that during the past year?

A. Yes, I have.

Q. Did you receive any substance from Mr. Wells for analysis on July 22, 1949?

A. On July 22 I received a package from Mr. Wells.

Q. What did that package contain?

A. One package consisting of six capsules. Then there was one looked like the top of a Vicks Vapo-Rub inhaler that had, seemed to be two little capsules adhering to the top. They contained cocaine hydrochloride..

The Court: Just a moment. [78]

Mr. Miho: I didn't get the last answer.

The Reporter (Reading): "They contained cocaine hydrochloride."

Q. (By Mr. Hoddick): What do you mean by that?

A. All of the capsules. I took six capsules. They were weighed and then I think I took two of those capsules at random. Yes, I took two of those capsules and examined those quantitatively. But I took one of the capsules at random and examined to see if it were cocaine. Also that little top from the Vicks inhaler, I scraped a little bit off and examined that qualitatively and scraped a little off and examined that with chloroplatinic acid.

Q. How?

(Testimony of Gilbert J. Carr.)

A. With a little knife. You only need a very small quantity.

Q. To get the part do you have to break the capsules?

A. Oh, yes, you have to break the capsule, or open a capsule. I don't know whether these came apart easily or if I broke them. I have forgotten now.

Q. Did you make any written record anywhere of exactly what you did in this test, which capsules you tested?

A. No, that is all routine testing during standard tests we use. The samples were all initialed which I tested.

Q. How did you return—Did you return these articles to Mr. Wells [79]

A. Yes, they were returned to Mr. Wells on July 25.

Q. And how did you return them to him?

A. They were in a sealed envelope.

The Court: Before we identify these envelopes, as you appear to be about to do, let's take our second recess.

(Recess had.)

The Court: The jury is present as is the defendant. You may continue.

Mr. Miho: If your Honor please, at this time I would like to object. I didn't want to interrupt a while ago. I would like to object to this witness' reading from whatever he is reading from unless

(Testimony of Gilbert J. Carr.)

it can be shown it is something pertinent to this issue.

The Court: Have you been reading from something?

Mr. Miho: He made a statement he made no written record of his investigations at the laboratory.

Mr. Hoddick: Excuse me. That is not what the statement was. He said he did not make a record of the exact manner in which the capsules, and so on, were returned to Mr. Wells.

The Court: Well, there is an objection pending.

Mr. Hoddick: I will endeavor, your Honor, if I may, to establish a foundation for the use of this record.

The Court: All right.

Q. (By Mr. Hoddick): Mr. Carr, did you make a report of your analysis? [80]

A. Yes, I did.

Q. And did you describe therein what you had analyzed? A. Yes, I did.

Q. And do you have that report with you?

A. Yes. It is a standard record. Every sample that comes in the laboratory, record is made of that sample.

The Court: That is what you have in your hand?

The Witness: Yes, a record is made of that sample; a record of analysis or some pertinent information is put on that card. We receive hundreds and hundreds of samples. I can't remember for the particular one. I must keep some record.



(Testimony of Gilbert J. Carr.)

Q. Mr. Carr, on July 22, 1949, did you receive any other substances from Mr. Wells for analysis other than these six capsules, two of which were adhered to what looked like a top of a Vicks inhaler tube?

A. This card shows only that he brought in this one particular package.

Q. On that day? A. On that day, yes.

Q. How many capsules did he bring in?

A. There were six capsules, and then this little—looked like the top of an inhaler, and it looked like two capsules adhering to that top.

Q. That would make eight capsules altogether?

A. That would make eight capsules altogether.

Q. When you returned these capsules and what looked like the top of a Vicks inhaler tube to Mr. Wells, in what form did you return them?

A. The capsules which I used, or the powder which I used, the empty containers I put back in the same envelope. All the packages were sealed and my initials are on the packages.

Q. You spoke of six capsules which you received? A. That's right.

Q. Did they go in one envelope?

A. I don't remember.

Q. You say you put your initials on the envelopes? A. That's right.

Q. I show you Exhibits A-1, for identification purposes, and A-2, for identification purposes, and ask you if your initials appear thereon.

A. Yes, they do. And also laboratory number.

(Testimony of Gilbert J. Carr.)

Q. What are your initials? A. G. J. C.

The Court: And also what?

The Witness: Also the laboratory number.

Q. (By Mr. Hoddick): And where did you write those initials on these?

A. Right at the top of each envelope. [82]

Q. Across the fold? A. That's right.

Q. And what is the laboratory number that you put on here?

A. One is 200 and one is 201; 200 is the six capsules; 201 is the two adhering to this, looked like a Vicks inhaler top.

Q. And what did you do with these two envelopes?

A. I sealed them and gave them back to Mr. Wells on July 25.

Q. Did you put them in any other kind of a container?

A. I think I put them in another envelope and sealed that. I don't remember. I have no record here.

Q. I show you United States Exhibit A, for identification purposes, and ask you if your initials appear on it. A. Yes, they do.

The Court: What?

The Witness: Yes, they do. I probably put them back in this envelope and sealed this also. My initials are on here.

Q. You did seal this envelope? A. Yes.

Q. Now, you testified that the samples which you took from those six capsules contained cocaine

(Testimony of Gilbert J. Carr.)

hydrochloride.           A. That's right.

Q. How did you determine that? [83]

A. With—first we test for an alkaloid with  
Mayers.

Mr. Miho: What is that again?

The Witness: Mayers. And Wagners. And they  
showed the presence of a narcotic.

The Court: Excuse me. Would you go over that  
again. What have those two names got to do with  
what you did?

The Witness: To determine first if it is a nar-  
cotic.

The Court: So you did what?

The Witness: These two reagents will tell me  
immediately if there is a narcotic present.

The Court: Reagents?

The Witness: That is right.

The Court: Mayers?

The Witness: Mayers and Wagners.

Q. (By Mr. Hoddick): When you use those  
two reagents, does that reveal what type of narcotic  
is there?

A. No, that just reveals whether the narcotic is  
present. In this case, of course, those two reagents  
were positive.

Q. And what did you do to tell the type of  
narcotic?

A. Then to determine whether it is morphine  
or some other type, several other reagents are used.  
In this case the ones for morphine were negative,  
showing no morphine alkaloids [84] present.

(Testimony of Gilbert J. Carr.)

Chloroplatinic acid is used for cocaine. In this case that was positive, which is specific for cocaine.

Q. What do you mean when you say "specific for cocaine"?

A. There is no other substance up to this time that I know of that gives exactly the same type of crystals for that particular reagent, that gives crystals which are identified under the microscope.

Q. Did you perform these same tests on the part which you took from the two capsules that were stuck to the Vicks inhaler tube?

A. Yes, I did.

Q. With the same results?

A. Same results.

Q. When did you return the capsules, that part of the Vicks inhaler tube, and whatever residue was left from your tests to Mr. Wells?

A. Oh, on July 25.

Q. I ask you to examine the contents of United States Exhibit A-2, for identification purposes. You have already testified that you put the contents in and sealed the envelope. Tell us whether the contents are in the same condition today as they were in when you returned them to Mr. Wells.

A. Yes, they are.

Q. And what are those contents? [85]

A. There is one, two, three, four full capsules and two empty capsules.

Q. And why are the two capsules empty?

A. They are the two I used for a quantitative examination. Probably one of these others ought

(Testimony of Gilbert J. Carr.)

to be broken a little bit. No, I took a part of those two. I also used part of those two for the qualitative tests, and what was left I used as quantitative.

Q. What do you mean by "qualitative" and "quantitative"?

A. Qualitative, to see if cocaine is present; quantitative to see how much cocaine.

Q. And what was the result of your quantitative test?

A. It showed 98½ per cent cocaine hydrochloride.

Q. Will you put those substances back in Exhibit A-2, for identification.

A. (Replaces contents.)

Q. Will you examine the contents of Exhibit A-1, for identification purposes.

A. Yes.

Q. Are those contents in the same condition as they were when you put them in the envelope?

A. Yes, they are.

Q. You said the two capsules were adhered to the top of the Vicks inhaler tube?

A. Yes.

Q. So it was all one unit?

A. That's right.

Q. How come it is in two parts now?

A. First I tried to scrape the contents out of the two little tubes here, if I remember correctly; then I was going to weigh just the contents, but I couldn't get the contents out of these two little tubes here, so I weighed the entire thing by itself. I put the two back together and weighed the whole thing as a whole.

Q. Was it necessary for you to break out—

(Testimony of Gilbert J. Carr.)

A. Well, my original intention was to attempt to weigh the amount of powder which was in here.

Q. Weigh the amount of what?

A. The powder. But it was so small after I had taken these out that I decided to weigh the entire thing.

Q. You were the one who took the two capsules out?           A. That is right.

Q. You put the two parts back in the envelope?

A. That's right. I took a little bit of this out and examined it with chloroplatinic acid.

Q. That also proved to be——

A. Cocaine hydrochloride.

Q. What quantity?

A. There was not enough here for a quantitative test. I only made a qualitative test here. [87]

Mr. Hoddick: Your Honor, at this time I should like to offer in evidence the United States Exhibit A-1, for identification purposes, with contents; A-2, for identification purposes, with contents; and this report of the analysis which Mr. Carr now holds in his hand.

Mr. Miho: Objection, if your Honor please. There is a serious flaw in the testimony of this defendant as to the chain of events and the method of testing, and it is not an exclusive process with relation to all of the capsules in Exhibit A-1, for identification. The foundation is improper for its admission in evidence at this time.

Mr. Hoddick: Would you point out what the flaw is, Mr. Miho?



(Testimony of Gilbert J. Carr.)

Mr. Miho: I am not supposed to do your job.

Mr. Hoddick: You should lay grounds.

The Court: The objection is meaningless unless you give it some substance.

Mr. Miho: If your Honor please, if I may state, Mr. Carr has stated that he made one test out of two capsules adhesive to the top—well, to come back to A-1, he has stated he made tests out of one capsule for one purpose, quantitative analysis, and one capsule for another purpose. If your Honor please, there are six capsules altogether, and unless this witness can state he has made a test of the contents of each separate capsule and what it contains, it is improper for that [88] evidence to go in at this time.

Mr. Hoddick: Your Honor, first of all, the witness stated he took two capsules at random. He did not make a qualitative test, as I recall, and correct me if I am wrong, Mr. Carr—he did not make a qualitative test from one and a quantitative test from another. As I gather, he made the qualitative test and then used the remainder for the quantitative; is that right?

The Witness: Yes.

The Court: The upshot is that all you know about the capsules, six in number, is limited to two.

The Witness: I took two at random, that is true, but those two, from a scientific standpoint, could have been any two.

The Court: But you don't actually know what is in the others?

(Testimony of Gilbert J. Carr.)

The Witness: Don't actually know what is in the other four, that is right.

Mr. Hoddick: Your Honor, as I understand the practice in the operation of the Food and Drug Administration and Alcohol Tax Unit work, narcotics work, they only test samples. You want to have a portion of the contents in their original condition. I will admit that the jury in its discretion can determine whether the other four capsules are the same. It goes to the weight of the evidence and not its [89] admissibility.

We have tracked this evidence from the defendant's possession, and we have shown that certain samples taken at random are cocaine hydrochloride, a derivative of cocoa leaves. It is only by inference, because they were samples taken at random, that the jury could find whether all six of the capsules contained cocaine hydrochloride. But I think that is up to the jury to determine and does not go to the admissibility of the evidence.

Mr. Miho: If your Honor please, the jury is not a chemist. They are not required under oath and jury duty to know and guess from one thing to another on an important piece of evidence. If the two capsules Mr. Carr testified about were part of the same mass, Mr. Hoddick's point would be good, but inasmuch as they are in absolutely separate capsules and pieces, his position is entirely untenable, your Honor.

Mr. Hoddick: It is the same thing, your Honor, that is done with one whisky bottle out of a case.



(Testimony of Gilbert J. Carr.)

It has been the standard process. As I said, I won't argue that it has been proved conclusively to the jury that the four capsules there that still have contents in them contain cocaine hydrochloride. I think there is circumstantial evidence from the fact that Mr. Carr merely took a sample, and you have six uniform capsules here, that they do contain cocaine hydrochloride. But I still contend, your Honor, that it is admissible [90] in evidence for whatever it may be worth.

The Court: To prove what?

Mr. Hoddick: To prove that the defendant had in his possession six capsules, two of which, by chemical analysis, taken at random, were cocaine hydrochloride.

The Court: That is the most that it would show.

Mr. Hoddick: And by inference that is up to the jury.

Mr. Miho: If your Honor please, we have no criminal trial in the Constitutional history of the United States trying a man on inference, if your Honor please. This is not circumstantial evidence, such as you see a gun in the defendant's hand and fingerprints on it. This is chemical analysis by an expert witness as to the contents of six separate capsules.

The Court: He hasn't testified as to six, only as to two.

Mr. Miho: Yes, but Mr. Hoddick wants to introduce the four that this chemist doesn't know

(Testimony of Gilbert J. Carr.)

what they contain, under the evidence so far, and to introduce that, if your Honor please, as evidence before the jury is entirely erroneous and highly prejudicial to the defendant's cause. If Mr. Carr knows what is in those capsules and can swear to the contents, that would be something else; but for him to test only two out of six and Mr. Hoddick try to introduce four not tested, certainly that is improper. [91]

Mr. Hoddick: For the purposes of introduction I will stipulate that Mr. Carr, by virtue of a chemical analysis, does not know, as a matter of his own knowledge, that those four capsules contain cocaine hydrochloride, but I think they are admissible to show that the defendant had in his possession six capsules, two of which, by test taken at random, prove to be cocaine hydrochloride. That is all I want.

The Court: On that basis and that basis alone, namely, that only two of the six are positively identified as containing cocaine, the objection is overruled.

Mr. Miho: May I save an exception?

The Court: You may have an exception.

Mr. Hoddick: And, your Honor, I also would like to have introduced as evidence at this time——

The Court: Wait a minute until we get this marked. This is a package containing——

Mr. Hoddick: Six capsules. It is Exhibit A-2, for identification purposes.

The Court: A-2, for identification purposes, becomes——

(Testimony of Gilbert J. Carr.)

The Clerk: U. S. Exhibit No. 2-A.

Mr. Miho: If your Honor please, I would like an elaboration of what the exact limited purpose of the introduction is. It is clear that in Exhibit A-2 there are four capsules that evidently have some white substance in them and no one [92] knows what they are.

The Court: Precisely.

Mr. Miho: But it is going to be introduced in evidence and is permitted to be introduced for the purpose of what, if your Honor please?

The Court: The testimony is, as you know, so far that these six capsules were picked up by Officer Shaffer after the struggle on the defendant's premises, the struggle being with the defendant.

Mr. Miho: Yes.

The Court: This witness testifies that after these things came through channels to him for testing purposes, he tested two of them at random.

Mr. Miho: Yes.

The Court: And the two that he did test, he has testified as to their content. As to what is in the other four has not been the subject matter of chemical analysis. Whether or not, as to the other four, the Government has or has not proved their content beyond a reasonable doubt is a question you gentlemen can argue.

Mr. Miho: May I still save an exception, if your Honor please.

The Court: Certainly.

(Testimony of Gilbert J. Carr.)

(Thereupon the item above referred to was received in evidence as U. S. Exhibit No. 2-A.)

Mr. Hoddick: Will you hand me Exhibit A-1, for identification purposes.

(Handed to Counsel.)

Mr. Hoddick: I would like to offer A-1, for identification purposes, in evidence. This contains the top of the inhaler tube and that other particle which Officer Abbey found and delivered to Mr. Wells and Mr. Wells delivered to Mr. Carr and Mr. Carr analyzed and found it to contain cocaine hydrochloride, but was unable to make a quantitative test to determine exactly what percentage of cocaine hydrochloride.

The Court: The same may become—Hearing no objection; do you have an objection?

Mr. Miho: I would like to enter an objection on the same ground.

The Court: On the same ground?

Mr. Miho: No, if your Honor please. For Exhibit A-1 on the grounds, if your Honor please, that there has not been shown an exclusive continuity of possession, if your Honor please. I would like to incorporate an objection on the other exhibit, the six capsules, A-2.

The Court: Overruled.

Mr. Miho: Save an exception, your Honor.

The Court: Granted.

The Clerk: U. S. Exhibit 2-B. [94]

(Thereupon the item above referred to was received in evidence as U.S. Exhibit No. 2-B.)

(Testimony of Gilbert J. Carr.)

Mr. Hoddick: I would like at this time to show the exhibits to the jury.

The Court: You may.

(Handed to jury.)

Mr. Hoddick: No further questions.

The Court: Cross-examination.

*Cross-Examination*

By Mr. Miho:

Q. Mr. Carr, with regard to these envelopes that Mr. Wells gave you, when did you receive them?

A. On July 22.

Mr. Miho: If your Honor please, do I understand Mr. Hoddick wishes to introduce what he is reading from in evidence?

Mr. Hoddick: Excuse me. I did make an offer and it slipped my mind for the moment.

Mr. Miho: May I be permitted to examine the manuscript?

The Witness: This is the record in the laboratory. Do I get that back?

Mr. Hoddick: If it is introduced, you will get a photostat of the original or the original back. [95]

The Court: You did mention offering that, but you let it fall by the wayside.

Mr. Hoddick: I would like to reopen my direct examination for the purpose of offering this in evidence.

I offer Customs Laboratory Record Card, Lab 200-201, containing the date July 22, 1949, up in the upper right-hand corner, in evidence.

(Testimony of Gilbert J. Carr.)

The Court: Mr. Witness, this is your record?

The Witness: That is right.

The Court: And the substance that you have testified?

The Witness: Yes.

The Court: The same may become——

The Clerk: U. S. Exhibit 2-C.

(Thereupon the document above referred to was received in evidence as U. S. Exhibit No. 2-C.)

Mr. Hoddick: May I have permission, your Honor, to withdraw that and substitute a photostatic copy at the conclusion of this trial?

The Court: Yes. Now you may cross-examine.

Q. (By Mr. Miho): You received these two articles that the jury is inspecting now from Mr. Wells? A. That's right.

Q. In your office? [96] A. That's right.

Q. And when was that? A. On July 22.

Q. And in what condition did you receive them?

A. I don't remember. I am testifying solely from the record there or if my initials are on the envelope. He just gave me a package.

Q. I am just trying to recollect your memory.

A. He usually brings a package over, just a sealed envelope. Or, as a matter of fact, on every case he has brought a sample over in a sealed envelope.

Q. As a matter of fact, you are the only Federal chemist; is that right? A. That's right.



(Testimony of Gilbert J. Carr.)

Q. And you have a lot of work, don't you, Mr. Carr, that is, for other people; it is rough on you; and about July 19, it is—22nd——

A. July 22.

Q. When you got these envelopes from Mr. Wells. How many tests for narcotics were you making at that time, how many other tests?

A. Probably none at that particular time. Mr. Wells is about the only one who brings me samples of narcotics. I get some samples of narcotics from examiners sometime, but at that particular time the longshoremen strike was on. [97]

Q. You are not sure, are you? You think these were the only ones, so far as your recollection goes?

A. That's right. I don't remember July 22.

Q. And at what time?

A. I think that is on the envelope.

Q. You are not sure.           A. I am not sure.

Q. Anyway you received them. And what is your usual practice? What did you do?

A. In his presence I opened the package, and then make those few preliminary tests right in his presence to see whether they do contain narcotics. If they don't, he can take them back and go about his business. In this particular case, if they do, then I keep them.

Q. Did you do that on this occasion, do you recall?           A. I did. Yes, I did.

Q. Then Mr. Wells just didn't give you the envelopes and let you do the tests and walk out?

A. No, he usually stays for a few minutes to

(Testimony of Gilbert J. Carr.)

see the outcome of the preliminary test.

Q. He didn't just hand you these envelopes and walk out of the room? A. No.

Q. He stayed around?

A. He stayed around and was in my presence when I opened [98] the envelope.

Q. Then he left you?

A. Probably sometime afterwards.

Q. Then you continued your tests?

A. That's right.

Q. The same day or the next day?

A. It went over a period from 22nd to 25th.

Q. For about three days? A. Yes.

Q. Your office is not like a safe where no one else can get in; isn't that right?

A. I have the only key—at that particular time I had the only key to the one door on the second floor.

Q. But during the day when you are working, you go back and forth from that office; you don't close the door and lock it each time you go out of the room? A. That's right.

Q. So if someone had come into your office when you were testing from the 22nd to the 25th, you wouldn't know who could have come in, would you?

A. I would have some idea. I am in there most of the time.

Q. Anyone could walk in; the door is open?

A. That is right, the door is open.

Q. If you went to see someone down the hall and someone [99] had walked into that office, you wouldn't know?



(Testimony of Gilbert J. Carr.)

A. If there was somebody unusual, I would find out somehow.

Q. But you have no watchman there when you walk out of that office? A. No. That is right.

Q. Do you recall how many people walked into your office during that interval of time while you were making these tests?

A. I don't remember any.

Q. You don't remember anyone coming in to see you?

A. I don't remember this particular day.

Q. How about the 23rd? A. No.

Q. Or the 24th? A. No.

Q. You kept on making these tests from about the 22nd to the 24th, 25th?

A. Twenty-second to twenty-fifth.

Q. Where did you leave these capsules and these other things, Exhibit A-2, during those three or four days?

A. They were in one of my drawers in the laboratory. I have a certain part of the lab there in which I have all my narcotic reagents. There must be about forty drawers in my laboratory, and when I am working on narcotics I put them [100] in not the same drawer every time.

Q. You put them in different drawers?

A. Different drawers.

Q. And then work on them?

A. That's right.

Q. Where did you place the envelopes?

A. Same drawer. In case somebody does call in,

(Testimony of Gilbert J. Carr.)

they might get curious, so these are placed in these drawers.

Q. They have no locks on them, though?

A. Not the same one every time.

Q. I said, the drawers have no locks on them, though?

A. No, we haven't. That is why I have the various drawers.

Q. Now, Mr. Carr, these two capsules adhesive to the inhaler top, you could not make a quantitative test?

A. No, there was not enough.

Q. Not enough? A. That's right.

Q. So that you don't know what percentage of cocaine was in those?

A. No, I don't.

Q. But you think that there was cocaine?

A. I know there was cocaine.

Q. You were able to make a test? [101]

A. Yes.

Q. That there was cocaine in them?

A. That's right.

Q. Then after you finished your test, you made your notes. You made your Mayer and Wagner tests, and what other tests did you make?

A. You test to see whether it is a chloride or nitrate.

Q. Acid?

A. What particular type of acid it is. I used silver nitrate, which is a test for a chloride.

Q. And you made all those tests?

A. That's right. No, no, I usually—Most of your narcotics are chlorides, so I used silver nitrate

(Testimony of Gilbert J. Carr.)

first, which immediately eliminates all the other ones.

Q. And you finally came to the conclusion that so far as two capsules out of six were concerned, they were cocaine? A. That's right.

Q. Cocaine hydrochloride? A. Yes.

Q. And the percentage of it?

A. No, not the——

Q. You don't know how much it contained?

A. No, I don't, not these two——

Q. The two capsules out of the six that you tested, you don't know the quantity it contained?

A. The two I tested, yes, I do. [102]

Q. What was that percentage?

A. It was around 98—it is on the back; 98½ per cent cocaine hydrochloride.

Q. I see. Now these Wagner and Mayer tests and other acid tests you performed, they are not exclusive to cocaine derivatives, are they?

A. The chloroplatinic acid is.

Q. At what stage did you use that?

A. That was at about the third or fourth stage. using Mayers first and Wagners and various other reagents for morphine alkaloids, and then the chloroplatinic acid.

Q. Then you tested it for the presence of cocaine? A. That is right.

Q. And you say that is conclusive for cocaine?

A. Specific for cocaine. Specific. No other substance, as far as I know right now, gives exactly the same type of crystals. I have never seen any in

(Testimony of Gilbert J. Carr.)

my 22 years in laboratory. I haven't seen anything in any literature.

Q. What about synthetic cocaine?

A. Synthetic cocaine does not give it either.

Q. Are you sure about that?

A. Absolutely sure.

Q. Any coal tar derivatives that might give the same kind of crystals?      A. No. [103]

Q. On the same kind of test?      A. No.

Q. You are sure of that?      A. I am sure.

Q. What is cocaine derived from, Mr. Carr?

A. The leaves of the cocoa plant.

Q. How is it processed?

A. I am not familiar with the processing.

Q. Well, cocaine hydrochloride, such as in these two capsules that you found, they are in a powder form; is that right?      A. That's right.

Q. And you have to liquefy it in order to find the crystals in it?

A. I don't get what you mean.

Q. That final test you spoke of, you put it in sort of a liquid form?

A. No, just take a little bit of the powder and add chloroplatinic acid to it and it forms these particular crystals.

Q. You are not sure what is in the other four capsules; is that right?      A. No, I am not.

Q. Merely by looking at it, unless you make and complete these six or seven tests, you cannot tell what they are; is [104] that right?

A. That's right.

(Testimony of Gilbert J. Carr.)

Q. If you wanted to, you could have tested all four capsules?

A. That is right. When I took those two, if one had not been cocaine, I would have examined the rest of them. By taking them at random, and those two were cocaine, I can safely assume the others were cocaine.

Q. Safely assume?

A. I can safely assume from past testing.

Q. Will you say positive? A. No, sir.

Q. You can't say except that you assume?

A. No, sir.

Mr. Miho: That is all.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Hoddick: May I have just half a moment of the Court's time.

The Court: Yes.

Mr. Hoddick: Call Captain Whitford, please.

### HUGH WHITFORD

called as a witness on behalf of the Plaintiff, being first [105] duly sworn, was examined and testified as follows:

The Court: Will you state your name, age, residence, occupation, and citizenship.

The Witness: My name is Hugh Whitford. I am 45 years old.

The Court: Residence?

(Testimony of Hugh Whitford.)

The Witness: Live at 1437 Pele Street.

The Court: Honolulu?

The Witness: Yes.

The Court: Occupation?

The Witness: I am lieutenant detective with the Honolulu Police Department, and I am a citizen of the United States.

The Court: Only?

The Witness: Yes.

### Direct Examination

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Captain Whitford?

A. About 19 years and four months.

Q. And in July of 1949 what were your duties?

A. I was captain of the police in charge of vice division for the Honolulu Police Department.

Q. Do you know the defendant, Orestus Cavness? A. I do. [106]

Q. Will you point him out, please?

A. The man sitting down at the end there (indicating).

Q. The far end of the table?

A. That is right.

Mr. Hoddick: May the record show he has identified the defendant.

The Court: Yes.

Q. (By Mr. Hoddick): Did you see the defendant during July of 1949? A. I did.

Q. Do you remember what day it was?

A. July 19.

(Testimony of Hugh Whitford.)

Q. And did you make a raid on the defendant's house on that day?      A. I did.

Q. At what address?

A. 3811 Leahi Avenue.

Q. And where had you been immediately prior to the raid?      A. Where was I you say?

Q. Yes.

A. I was across the street in the home of Mr. Abbey.

Q. And was he——      A. That same date.

Q. Is he connected with the police department?

A. Yes. [107]

Q. In what way?

A. We went for the purpose of——

Q. What is Mr. Abbey's connection with the police department?

A. He is a reserve with the police, police reserve.

Q. What time did you get to Officer Abbey's house?

A. I believe it was about 2:35 p.m., 2:40, somewhere around there.

Q. Were there other officers with you?

A. Yes.

Q. Who?

A. Sergeant Sasaki, Richard Sasaki, and Sergeant Sousa, and Officer Paul Shaffer, and Agent Wells, and Mr. Abbey.

Q. And yourself?      A. And myself.

Q. And about what time did you actually consummate the raid?



(Testimony of Hugh Whitford.)

A. It was about 5:30, 5:38, somewhere around there, p.m., the same day.

Q. And did all the officers leave Officer Abbey's house? A. That's right.

Q. Now will you just describe, telling only the things you know, that you saw, what took place right after you left Officer Abbey's house. [108]

A. We left Officer Abbey's home when we noticed the defendant Cavness here driving his car into the driveway of his home. Agent Wells and I left together, and we crossed the street and walked over to where the defendant's car was parked in the driveway of his home, and as we approached the car, we separated. We were in the rear of the car. The car was facing toward the house. We were in the rear of the car; we separated; I went to the right side of the car; Agent Wells went to the left side, or the driver's side, in other words.

Q. Was there anybody in the car with the defendant? A. What was that?

Q. Was there anybody in the car with the defendant?

A. No. No, the defendant was alone.

Q. And what kind of a car was it?

A. It was a Hudson car.

Q. A sedan?

A. A sedan, yes. And as I got to the right-hand side of the car in the front where the front door is, all of a sudden I figured there was something wrong.

Q. What made you think there was something wrong?



(Testimony of Hugh Whitford.)

A. Well, I heard sort of commotion like. The defendant was out of the car, and I ran around to the front of the car to see what was happening, and as I got to the front of the car and a little to the left of it, I saw Agent Wells and [109] Sergeant Sousa hanging onto the defendant here, one on each side, and gave me the impression that the defendant was trying to get away, or something to that effect; so I joined in and tried to hang onto the defendant, and by that time he sort of staggered like they were trying to hang onto him. I joined in and tried to get hold of the defendant here to hold onto him, and we all fell down to the ground, and he fell forward and was completely on his stomach and his face downward, and I got onto his right, the defendant's right, as he laid there, and looked at him. I noticed he was chewing on something. I didn't know what it was at the time, but all I could see was a little particles of what appeared to be green and white in color.

Q. Where did you see these particles?

A. On his lip, on his lower lip.

Q. Did it make any noise when he chewed on it?

A. Yes, there was a crackling sound. And I figured, well, he was trying to probably get rid of something, so I tried to see if I couldn't get the thing, whatever he had in his mouth, out. Tried to get my fingers in and I almost got bitten, so I pulled my fingers back, and at that time I noticed also he had his right fingers clenched tightly, so I was trying to get it open and see what was in it. I figures

(Testimony of Hugh Whitford.)

he had something in there, and he at the same time was trying to pull his hand away from me. He was trying to pull it back and [110] underneath of his face. That kept on for a little while and by that time I noticed Reserve Officer Abbey there, so I asked him if he minded to assist me, and he got hold of his blackjack and he tapped his hand a few times and opened it; so I got hold of what he had in his hand.

The Court: All right, we will stop there for our noon recess and resume at 2 o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2 p.m. of the same day.) [111]

#### Afternoon Session

The Court: The jury is present and so is the defendant. Are the parties ready to proceed?

Mr. Miho: Yes, if your Honor please, ready for the defendant.

Mr. Hoddick: Ready for the plaintiff, your Honor.

#### HUGH WHITFORD

resumed the stand and testified further as follows:

The Court: Captain Whitford, I remind you you are still under oath. I believe you were about—I forget where I interrupted.

Mr. Hoddick: I believe Captain Whitford was just testifying that Officer Abbey tapped the defendant's hand.

The Court: Oh, yes. All right, you may proceed.

(Testimony of Hugh Whitford.)

Direct Examination

(Continued)

By Mr. Hoddick:

Q. Captain Whitford, did the defendant open his hand after Officer Abbey hit it with the blackjack? A. Yes, he did.

Q. And which hand was that?

A. The right hand.

Q. And did you take something from that hand?

A. I did.

Q. What did you take?

A. A broken piece from a Vicks inhaler tube.

Q. Which part of the tube was it?

A. I believe it was the top part.

Q. What do you mean by the top part of the tube?

A. Can I explain it with that Vicks inhaler tube there? I believe it was this portion here, this upper part (indicating).

Q. You think so. What did you do with the piece?

A. Took it back to the station, and I turned it over to Agent Wells after I marked it.

Q. Is it possible it was another part of the tube?

A. Could be possible.

Q. And where in the station did you give it to Mr. Wells?

A. In my office in the vice division.

Q. Now, after getting this piece of inhaler from the hand of the defendant, what took place?

A. Well, shortly after that, the defendant was

(Testimony of Hugh Whitford.)

subdued and we all got up and then we went to the house, I believe to the house right after that.

Q. And what happened in the house?

A. Well, in the house the men that went in with us were instructed to keep with Agent Wells there and to search the house after we were ready, after he had served the warrant on the defendant.

Q. Did you have occasion to go out of the house after going into it? [113]      A. Yes.

Q. Why?

A. Someone mentioned the fact that there was something out on the grounds that looked like it might interest Mr. Wells here.

Q. That looked like what?

A. White capsules of some kind that might interest Mr. Wells.

Q. Did you go out, too?      A. I did.

Q. And did you go back into the house again?

A. Yes.

Q. About how long were you in the house?

A. About fifteen to twenty minutes.

Q. Pardon?

A. About fifteen or twenty minutes.

Q. Then what did you do?

A. I went in the back yard, walked around the back yard there and came back in the house. I was in and out most of the time.

Q. About what time did you go down to the station?

A. I believe it was about 8 o'clock, I think, or just before 8.

(Testimony of Hugh Whitford.)

Q. It was after you got there that you gave this part of the inhaler tube to Mr. Wells? [114]

A. Yes, I believe that is when it was, when we got down there.

Q. Did you see what Mr. Wells did with it after you gave it to him?

A. Do I know what he did with it, you say?

Q. Yes, did you see what he did with it?

A. He put it in an envelope.

Q. Did he seal that envelope in your presence?

A. I don't recall.

Q. From the time that you removed this part of inhaler tube until the time that you gave it to Mr. Wells was there any change in its condition?

A. You mean the condition of the tube?

Q. Of the part that you found.

A. No, I don't—I don't think so.

Q. Was it in your possession during that entire period? A. I believe so.

Q. What did you do with it after you took it from the defendant's hand? Did you put it in your pocket?

A. I don't remember that part. I had it in my hand. I may have turned it over to somebody then at that time and got it back later.

Q. Let me ask this, Captain Whitford: When you gave that part to Mr. Wells, was it then in the same condition as when you found it? [115]

A. Yes, as near as I can recall, yes.

Q. When you found it, did you show it to Mr. Wells? A. I did.

(Testimony of Hugh Whitford.)

Q. Was that before or after Cavness was subdued?      A. I believe it was after.

Q. And did Mr. Wells keep it or did he give it right back to you, at that time when you first showed it to him?      A. I believe——

Mr. Miho: If your Honor please,——

The Court: Wait.

A. (Continuing): I don't remember that.

Mr. Miho: That is a very leading question.

The Court: Sustained.

Q. (By Mr. Hoddick): What did Mr. Wells do with it after you first showed it to him, Captain Whitford?      A. I believe he kept it.

Q. Do you know for how long?

A. No, I don't remember. Well, for a short while, for a short while. He kept it for a short while and then he gave it back to me, I believe.

Q. Did he give it back to you before or after you left the defendant's house?

A. I believe it was before we left the defendant's house.

Q. And you kept it until you got to the police station? [116]      A. Yes.

Q. Do you remember whether you placed any identifying marks on that piece of inhaler tube?

A. I did.

Q. And what did you put on it?

A. I had my initials on there with the date and the time.

Q. Will you open up Exhibit B for identification purposes. Or, before you open it, Captain Whit-



(Testimony of Hugh Whitford.)

ford, when did you put your initials on it?

A. Just before I turned it over to Mr. Wells in my office.

Q. At your office. Just tear open one end. Now, do you recognize the contents of that envelope?

A. I do.

Q. Do your initials appear on the contents of that envelope? A. Yes.

Q. Do you recognize those contents?

A. I do.

Q. Where did you see them before, or it before?

A. At the defendant's home.

Q. Is that the piece of tube that you took from the defendant's hand? A. That's right. [117]

Q. Is that the piece you gave to Mr. Wells to see? A. That's right.

Q. Is that the piece he gave back to you?

A. Yes.

Q. And is that the same piece you gave to him later at the police station? A. Correct.

Q. Is it in the same condition now as it was when you gave it to him at the police station?

A. That's right.

Mr. Hoddick: At this time, your Honor, I would like to offer this piece of Vicks inhaler tube in evidence, and to facilitate the marking I suggest we can put it back in the envelope that the Captain just took it out of.

Mr. Miho: I still object to it, if your Honor please. No continuity of possession proved by the Government, your Honor, no proper foundation being laid.



(Testimony of Hugh Whitford.)

The Court: Overruled.

Mr. Miho: Save an exception.

The Court: Granted. The same may become——

Mr. Miho: United States Exhibit No. 3, your Honor.

The Court: Three?

The Clerk: Yes.

(Thereupon, the document above referred to was received in evidence as United States Exhibit No. 3.) [118]

Mr. Hoddick: With the Court's permission I will show it to the jury.

The Court: Let the Clerk mark it first, please.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Miho:

Q. Was the defendant Cavness with you at the time you showed this piece that you placed in the envelope that you just opened up to Mr. Wells?

A. You say, was the defendant with me?

Q. Yes. A. I don't believe so.

Q. You showed this piece to Mr. Wells in the house, you say? A. No, outside.

Q. Outside? A. In the yard.

Q. And that was after the struggle was over?

A. That's right. That's right.

The Court: Speak louder, please.

The Witness: Yes.

Q. (By Mr. Miho): And who else was present

(Testimony of Hugh Whitford.)

when you showed this piece to Mr. Wells, if anyone was present?

A. I don't remember who it was. There was somebody there, [119] but I just don't remember who it was.

Q. You don't remember who?      A. No.

Q. You don't remember where you put the piece from the time you showed it to Mr. Wells up to the time you gave it to him in the vice squad, in your room; you don't remember where you placed it, whether you kept it in your mouth, stuck it in your ear, in your pocket, coat pocket, or your shirt pocket, you don't remember?

A. After I gave it to him and he gave it back to me, you mean?

Q. Yes, if he gave it back to you.

A. I don't remember.

Mr. Hoddick: Captain Whitford, will you speak loud enough so that all of the jurymen can hear you.

The Witness: I don't remember.

Q. (By Mr. Miho): Captain Whitford, you were there at Officer Abbey's house for about two hours waiting for Mr. Wells to make his move on this alleged raid; is that right? You and your men were waiting about two hours, from about two o'clock, two-thirty, until about six o'clock, a little before six, five-thirty or six; is that right?

A. That's right.

Q. And during that time you and your officers, except Mr. Abbey, were in the front sitting or living

(Testimony of Hugh Whitford.)

room; is that [120] right, facing the defendant's house?      A. Yes, we were in the living room.

Q. Do you remember whether Mr. Abbey went from where you people were into the kitchen and back or not to get something?

A. No. He could have. I don't remember that.

Q. Do you remember his giving you a glass of water with ice in it? Do you remember that?

A. I believe he did, yes.

Q. Do you remember his giving a glass of water with some ice in it, a glass of water to Mr. Wells?

A. I don't remember that.

Q. You don't remember that. How about your other officers?

A. They may have. We were scattered around in the living room there. They may have.

Q. Do you remember eating anything, something to chew on?

The Court: I don't understand that.

Mr. Miho: I asked him whether he remembers eating anything during that waiting period.

A. I don't remember eating anything.

Q. Do you remember whether Mr. Abbey served you with anything to chew on while you were waiting there in his house?      A. No.

Q. You don't remember? [121]

A. I don't remember.

Q. He may have served you something?

A. He could have.

Q. Do you remember anything other than glasses of water with ice in them served to you people?

(Testimony of Hugh Whitford.)

A. No.

Q. You don't. There was not any whisky served to the men?

A. I didn't see any if there was any there.

Q. And then you waited and then you stepped out of the house about the time Cavness drove into his yard; is that right?

A. That's right.

Q. And you and Mr. Wells came out of the house first?

A. That's right.

Q. And when you came out of the house Cavness had just driven into his front yard, into his driveway?

A. Correct.

Q. And you separated just as you got to the defendant's premises and you went to the right of the defendant's Hudson car and Mr. Wells went to the left of the defendant's car?

A. That's right.

Q. Now just a moment before you separated from each other, Wells and yourself, did Mr. Wells have his hands, or hand, in his pocket, or how did he have his hand, just out [122] like this (indicating) and walking?

A. I don't remember. I was too occupied with myself. I don't know where he had his hand.

Q. So that you don't know what he had in his hand when he went around the car and got separated?

A. No.

Q. You don't know whether Mr. Wells had anything in his hand or not?

A. No, I don't remember.

Q. You went to the front of the Hudson then?

(Testimony of Hugh Whitford.)

A. To the right front, yes.

Q. To the right front. Your idea was to cut off any escape, if any, from the front portion of the Hudson car; is that correct?

A. Could be that.

Q. Who went with you to the right front?

A. I believe I was alone.

Q. You were alone. Did you observe or did you give any instructions as to where the rest of the officers were to proceed or how they were to proceed, or whom they were to follow?

A. They were to follow both Mr. Wells and I.

Q. You don't know which officer actually followed you or Mr. Wells after you separated?

A. No, I don't. [123]

Q. You got to the front of the car anyway; is that right?

A. The right front, yes.

Q. And then as you got to the right front, you say you felt or saw or heard a commotion of some kind?

A. That's right.

Q. You were not in any position to see what was going on towards the left front where Mr. Wells was then?

A. No, from where I was at that time I was not able to see.

Q. And something drew your attention to the left; is that right?

A. That's right.

Q. And then you rushed over to the front left of the Hudson car?

A. That's right.

Q. And then you say you saw Mr. Wells and Sousa struggling with the defendant?

(Testimony of Hugh Whitford.)

A. They were hanging onto him. They were trying to hold him. He appeared as though he was trying to get away from them.

Q. And Wells was hanging onto what part of his body? A. I believe he was on the left.

Q. Hanging onto his left arm? A. Yes.

Q. Mr. Wells' two hands hanging onto the defendant's [124] left arm?

A. I am not sure he had both arms, but I am sure he was hanging onto him.

Q. Could have been both arms?

A. I am referring to Mr. Wells. He could have used both hands in holding the defendant.

Q. But you are not so sure? A. No.

Q. Anyway, you rushed over?

A. That's right.

Q. Which way was the defendant facing with relation to you as you came over to the left front?

A. He was facing towards the makai. By that I mean he was facing towards Waikiki direction.

Q. If this is the Hudson car (indicating), was the defendant facing this direction, as I stand, if this was the car, this being the front of the car, this the front door here (indicating), was the defendant facing in this direction (indicating)?

A. Yes, he was facing—but he wasn't standing that way. He was down more.

Q. Kneeling down?

A. And the upper portion of his body was slightly forward.

Q. Slightly forward? [125]



(Testimony of Hugh Whitford.)

A. Yes, something like that.

Q. Did he have his arms out like that (indicating) at that time?

A. No, not out that far, had it more along his side.

Q. And Wells was hanging onto his left arm at that time? A. That is right.

Q. And Sousa was hanging onto his right arm?

A. Yes, I believe Sousa was hanging onto his right side.

Q. And did you see Abbey hanging onto his legs?

A. I don't remember that.

Q. Did you see Cavness fall down at that time as he was front like this (indicating), in this position (indicating), Sousa on this side (indicating), Wells on this side (indicating), did you see Cavness go down on his knees?

A. No, I don't remember him going all the way down.

Q. Were you able to get to Cavness at that point?

A. Yes, I got to him—When I got to him he was just getting up, so I started to hang onto him.

Q. What part of his body did you grab?

A. I was trying to get over to the right side, and by that time there was somebody else other than Mr. Wells and Sousa.

Q. Sasaki there, do you remember? [126]

A. I don't remember seeing Sasaki there. He may have been in the back. I didn't see him from the position I was at that time.



(Testimony of Hugh Whitford.)

Q. You didn't see Abbey there at that time just as you got to the defendant?

A. I couldn't distinguish who it was. I remember distinctly Mr. Wells and Sousa. There was somebody else there, but who it was I don't know, until after that, until we were on the ground. That was right after this when we kept hanging onto him until everybody fell down to the ground.

Q. But you hung onto the defendant's right arm?  
A. That's right.

Q. Is that right?

A. I tried to, but others were trying to come in, too, at the same time.

Q. When you got to the defendant, you saw the defendant with his arms back like this (indicating)?

A. More or less.

Q. And you were able to grab his right arm; is that right?  
A. That's right.

Q. And you hung onto it; is that right?

A. I tried to hang onto it, but all the time he was moving and struggling at the same time.

Q. What did he do? [127]

A. He was trying to get away.

Q. What happened to his arm? Was he able to get away from you and Sousa, his right arm? Was he able to get his right arm away from you and Sousa?

A. I don't remember whether we were able to hang onto him constantly at that time. He was pushing, trying to pull away from us, and we were trying to hang onto him.

(Testimony of Hugh Whitford.)

Q. So you don't know whether he got his arm away from you and Sousa?

A. I was trying to concentrate on his right arm and hang on, and all the time we were moving; we weren't in one place.

Q. Do you know whether at that time Cavness was bleeding from the back of his head?

A. I don't recall.

Q. Was he bleeding from the front of his face at that point?

A. At that time I don't know; I couldn't see him. He had his head down most of the time.

Q. Then you couldn't see whether he was chewing anything or not, could you?

A. Not at that time.

Q. When did you see him chew anything?

A. When he was flat on the ground.

Q. When he was flat on the ground you saw him chewing [128] something? A. That's right.

Q. How did he have his hands when he was flat on the ground?

A. When he first fell flat to the ground, he had both hands this way; he was chewing on something; had both arms this way (indicating). I grabbed hold of his right hand and yanked it, and by that time somebody on his left got hold of his left hand, and he kept moving too fast all the time, and that is when I noticed he was bleeding on the lip.

Q. When he was flat on his stomach, he was able to put his hands like that?

A. Yes, he had his head up.

(Testimony of Hugh Whitford.)

Q. Was anybody on his back holding him down?

A. Oh, yes, there was somebody there.

Q. Holding him down?

A. Holding him down, or holding him up; I don't know just what, but there was somebody there.

Q. The defendant had both arms like this (indicating), his wrists in front of him, and he was chewing on something?

A. He was chewing on something.

Q. And he was making crackling sounds?

A. That's right.

Q. What did you do?

A. I yanked his right hand away from him.

Q. You yanked his right hand away from him.

A. And that is when I noticed he had his fist clenched like this (indicating) and I was trying to open it, and all the time he kept pulling it.

Q. What about his left arm?

A. His left hand was on the other side. Somebody got hold of it.

Q. You don't know?

A. I don't know what happened to his left hand. I was concentrating on his right hand.

Q. When you got his arm away from his mouth, you had hold of his right arm; is that right?

A. Yes, I had hold of it for a little while until he pulled it back again. He kept pulling his arm back, and I kept pulling his arm toward my direction.

Q. And he kept chewing?

A. Yes, he kept chewing.

(Testimony of Hugh Whitford.)

Q. What did he chew?

A. I don't know. All I saw was particles on his lower lip, adhering to his lower lip, white and green.

Q. White and green just like this (indicating)?

A. Something like that.

Q. And did you pick those pieces out of his mouth?

A. No, not that time. I almost got bit one time, so I didn't try to stick my finger another time.

Q. What happened to the pieces? Did you ever pick them up, you or the officers?

A. I don't know what happened at that time.

Q. But you are sure there were some pieces of white and green on his lips? A. That's right.

Q. Does this look like the top of a Vicks inhaler to you?

The Court: This being Exhibit 3.

Q. (By Mr. Miho): Does that look like the top of a Vicks inhaler to you? A. No.

Q. It is the bottom, isn't it, Captain?

A. I just assume it is the bottom. I don't even know which is the top and bottom of a Vicks inhaler tube.

Q. I show you—— A. It is the bottom.

Q. Well, you were mistaken about it when you said you picked up the top of a Vicks inhaler from the defendant; is that right? You were mistaken; is that right?

A. Well, I don't know which was the top and which was the bottom until now.

Q. You did say that you picked up the top of

(Testimony of Hugh Whitford.)

an inhaler, though, in answer to Mr. Hoddick's question?      A. I did. [131]

Q. And you must have had some idea of what was the top and what was the bottom of a Vicks inhaler when you answered Mr. Hoddick; is that right?      A. Yes.

Q. You still say you didn't know which was the top and which was the bottom when you answered Mr. Hoddick's question that you picked up the top part of a Vicks inhaler from the defendant's hand?

A. I did say that, yes.

Q. But you actually knew which was top and which was bottom of the Vicks inhaler tube? You knew at the time which was the top and which was the bottom?      A. I felt that I knew, yes.

Q. And you answered that what you picked out of the defendant's hand was the top of a Vicks inhaler; isn't that right?

A. That's what I said.

Q. So this is not the piece, this may not be the piece that you picked up? Take a good look again.

A. This is the piece I marked; I know that.

Q. Whose initial is this over here, Captain Whitford, P. S.; is that yours or Paul Shaffer's?

A. That is not mine.

Q. That is not yours?

A. Mine is H. L. W. in here. [132]

Q. You are familiar with Paul Shaffer's handwriting, aren't you, your immediate subordinate officer, aren't you?

(Testimony of Hugh Whitford.)

A. Not too much. I mean, I wouldn't be able to identify his handwriting now if he wrote, I don't think. He was not with me very long.

Q. Paul Shaffer never marked this in front of you when you gave it to Mr. Wells, or at any time in your presence, did he, so far as you know?

A. So far as I know, yes.

Q. So far as you know, the only one who marked this Exhibit 3 was yourself; is that right?

A. So far as I know, yes.

Q. And you had this thing in your possession all the time until you gave it to Mr. Wells in the vice squad captain's office, your office, and he placed it in this envelope and sealed it up?

A. I didn't see him seal it. I had it and turned it over to him in my office.

Q. You don't remember seeing him seal it. Now, are you sure he did seal it? A moment ago, in answer to Mr. Hoddick's question, you said you were not sure whether you saw Mr. Wells seal this in the presence of yourself or not. Now you say you are sure that you don't remember his sealing it in your presence. Now which is the correct answer?

A. I don't remember him sealing that. [133]

Q. Is that certain? You are sure about that?

A. Yes.

Q. So that if anyone else placed this P. S. mark on this exhibit, you don't know who did it? That is not your handwriting; you told us that is not your mark.

A. P. S. is not my mark.



(Testimony of Hugh Whitford.)

Mr. Miho: I would like to renew my motion, if your Honor please, to exclude this exhibit.

The Court: Your motion what? There is no motion.

Mr. Miho: I would like to renew my objection to its introduction, if your Honor please.

The Court: On what ground.

Mr. Miho: On two grounds. First, that the witness' own statement is that he picked up the top of a Vicks inhaler, and when he answered Mr. Hoddick's question, he knew which was the top and which was the bottom of a Vicks inhaler, which is contrary to the exhibit.

Secondly, he says he was the only one who marked it before the exhibit was handed over to Mr. Wells, and he admits on this particular exhibit introduced there is a mark on it, P. S., which he did not make, and he doesn't know who made it.

Mr. Hoddick: Your Honor, I asked him which part of the Vicks inhaler tube it was, and he said he thought it was the top. I asked him if perhaps it was some other part of the Vicks inhaler tube, and he said, "It might have been." [134] He also went on and testified later that that piece of tube which has been marked Government's Exhibit 3 is in the same condition now as it was when he gave it to Mr. Wells, and he identified his own initials on it.

Now, I think the question of how the P. S. got on it doesn't run to the admissibility of the evidence at all. It might establish that somebody else was present at the time he handed it to Mr. Wells and per-



(Testimony of Hugh Whitford.)

haps he put his initials on it. But he says it is in the same condition now as when he gave it to Mr. Wells. Mr. Wells says it is in the same condition as when he received it from Captain Whitford. I think that is enough to make it admissible in evidence and make it sufficient that Mr. Miho's motion to have it excluded should be denied.

The Court: Objection overruled.

Mr. Miho: May we save an exception, your Honor.

The Court: Granted.

Q. (By Mr. Miho): When you opened the defendant's right hand, and you say the defendant was chewing, and bringing his hand toward the front of his mouth or bringing it back, and you were struggling and trying to move his arm from the front of him to the side; is that right, and he had it in his fist closed up tight? A. That's right.

Q. And you had to ask Officer Abbey to tap his hand [135] with a blackjack to open it; right?

A. Right.

Q. And at the time Abbey was on the left-hand side, or right-hand side of the defendant, do you recall, as he lay prone on his stomach when you asked Officer Abbey to tap his wrist with his blackjack, which part of the defendant's body was Abbey standing on, or was he sitting on the defendant's buttocks?

A. I don't know what part of the defendant's body.

Q. Didn't you tell us yesterday, during the

(Testimony of **Hugh Whitford**.)

course of our hearing on our motion that he was on the left-hand side of the defendant, standing on the left-hand side of the defendant?

A. I didn't tell you that yesterday. I was not here yesterday.

Q. Well, the last time that you took the stand here, Friday.

A. Friday I may have said that.

Q. Friday you may have said that?

A. Yes.

Q. Well, today you are not sure?

A. Anyway he was there somewhere because I asked him—the position I was in, Abbey was on my left.

Q. He was on your left?

A. I was on the defendant's right. [136]

Q. You were on the defendant's right

A. That's right.

Q. And you asked Officer Abbey to tap his right hand? A. Yes.

Q. Right? A. That's right.

Q. And what else fell out of his right hand as Officer Abbey tapped it open, if anything? Just this piece here (indicating)? Just this piece here (indicating)?

A. I don't know what fell out. That piece didn't fall out. I took it out of his hand when he opened his hand, his fingers.

Q. Did you examine the defendant's palm at the time?

(Testimony of Hugh Whitford.)

A. No, not the way he was acting, I couldn't examine it.

Q. Did you notice his palm at any time? At any time later on? A. No.

Q. You did? A. No.

Q. Did you get a report from Officer Marcotte as to what the doctor found was wrong with him as far as injuries were concerned, or were you interested in that? In police procedure whenever anyone is injured, the Captain in charge gets the report of the extent of the injuries; that is pretty important, [137] isn't it?

A. That goes to the records bureau.

Q. But you have to report it with your OK before it goes to the records bureau?

A. I have officers under me.

Q. In this case he didn't know what happened to his medical reports.

A. That is part of their duties, to OK those reports.

Q. That is part of their duties, to OK those reports? A. That's right.

Q. Whose duty?

A. Sergeants under myself.

Q. But the sergeants report to you, don't they? The sergeants report to you, don't they?

A. They do not in every case.

Q. Not in every case. You mean the sergeant would send a report directly to the records bureau without your OK?

(Testimony of Hugh Whitford.)

A. Sure, they can do that.

Q. Did they do it in this case? What I am trying to get at is, Captain Whitford, you got no report of the defendant's palm being marked or cut in any way at any time, did you?

A. No report that I saw. I didn't see any report like that, but there may have been a report like that.

Q. There were no marks or cuts on his hand at the vice squad room, were there? [138]

A. I don't remember that.

Q. There were no scratches or cuts on the defendant's palms at the defendant's home?

A. I don't remember.

Q. But there were other marks on the defendant's head, his mouth and right cheek; isn't that right? Those injuries you checked, didn't you, at one time or the other?

A. The one I saw was on his mouth. I explained previously, when he was washing his face and I saw him bleeding, I noticed that.

Q. Did you notice the contusions on his right cheek and right eye? Do you know what contusions means? Black and blue marks.

A. He had bruises on his cheek, yes, but I didn't take a close look at it.

Q. What about his right eye?

A. What was that?

Q. What about his right eye?

A. I don't remember.

(Testimony of **Hugh Whitford.**)

Q. What about his scalp?

A. He may have had injuries on his head. He complained about it. He was sent to the hospital for it.

Q. What I am trying to get at: You, the captain of the police in charge, didn't you check when he complained about his injuries to see whether he was injured or not? [139]

A. I was told about it. That is why he was taken to the emergency hospital. I had him taken up there to be treated.

Q. You walked in with the defendant and Mr. Wells into the house; you are positive about that, aren't you?      A. That's right.

Q. And you had Mr. Cavness sit down on a chair in the living room, or Mr. Wells, one of the two of you? The moment you walked into the house you had him sit down in the chair?

A. I didn't have him sit down. Perhaps Mr. Wells did.

Q. You were together?

A. Several other officers. We weren't alone.

Q. Who else? Abbey was there?

A. I remember Paul Shaffer and I believe Sousa. The officers who were there.

Q. All the officers who were there at this trouble at one time, the first time you went into the house they all went into the house, didn't they, that first time?

A. I don't know if they all went in. I believe most of them went.

(Testimony of Hugh Whitford.)

Q. You believe most of them went?

A. That's right.

Q. Do you remember specifically if officer Abbey went into the house or not?

A. I saw him in the house. [140]

Q. You saw him in the house?

A. I saw him in the house.

Q. What about Shaffer? You say you saw him in the house, too?      A. I did.

Q. The first time, I am talking about, when you all went in.

A. I don't know whether the first time, but sometime during the time we were there I saw him in the house.

Q. Well, the defendant sat down and his search warrant was read to him by Mr. Wells the first time you went into the house; do you remember that?

A. I remember when Mr. Wells and the defendant were together, yes, when we were in the house. I didn't stay with them. I went a little ways into the living room.

Q. It is a small living room, isn't it?

A. That's right.

Q. A small 8 x 10 or 12; isn't that right?

A. That's right.

Q. So when you were in the corner of the living room, you could see what was going on in the rest of the living room?      A. Yes, possible.

Q. Do you remember Mr. Wells reading the



(Testimony of Hugh Whitford.)

search warrant or offering to read it to him? You don't remember that? [141] A. Yes.

Q. You didn't look at the defendant or go up to him and see how he was injured; you didn't do that at all? A. No, I didn't.

Q. In other words, you didn't look at how seriously the defendant was injured at any time; is that right?

A. He appeared all right to me; walking around, moving around.

Q. Wasn't he bleeding on his shirt?

A. Yes, he was bleeding.

Q. Officer Shaffer had a lot of blood on his shirt, too, didn't he? Or did you notice that?

A. I don't remember.

Q. Do you remember his shirt? Do you remember this shirt (indicating)?

A. I don't remember that shirt. I remember seeing a shirt colored like that, of the defendant.

Q. Something similar to this?

A. That's right.

The Court: That has been marked for identification, hasn't it?

Mr. Miho: Yes, your Honor.

The Court: Defendant's Exhibit 1?

The Clerk: Defendant's No. 1, for identification.

Q. (By Mr. Miho): And you say the defendant had both [142] fists tight?

A. I didn't say both fists. I said the right.

Q. Only his right fist?



(Testimony of Hugh Whitford.)

A. That is the only one I could see.

Q. You couldn't see his left fist or wrist at any time?

A. I take that back. In the beginning when he fell down, like I explained previously, when he had both like this (indicating), yes, and when I pulled his hands away, his left hand was on the other side. I don't know whether he had that clenched at that time; but all the time I was hanging onto his right hand. That is the one I remember. He had it clenched all the time.

Q. Did you remember seeing anyone else with a blackjack that day other than Officer Abbey?

A. No, I don't remember.

Q. You don't remember that?

A. I don't remember.

Q. What did Officer Wells tell you when you showed him this Exhibit 3, this broken piece of Vicks tube?      A. Where?

Q. When you first showed it to him, as you say.

A. I don't remember the exact words, but I believe he said, "That is the piece we want," or something to that effect. I don't remember the exact words.

Q. And then he took it out of your hand? [143]

A. What is that?

Q. And then he took it out of your hand?

A. I gave it to him.

Q. You gave it to him?

A. I handed it over to him to take a look at it.

Q. Where did he put it?

(Testimony of Hugh Whitford.)

A. I don't know. I don't remember.

Q. When did he give it back to you?

A. Sometime after that, right after that.

Q. Right after that?

A. Sometime after that, yes.

Q. He didn't keep it with him? He didn't keep it with him?

A. I don't believe he did.

Q. You don't believe he did? Didn't he keep it with him? He never returned it to you? Didn't he keep it with him all the time? Don't you remember that?

A. No, I don't remember.

Q. He might have kept it with him up until he came to the vice squad; isn't that right?

A. I believe he gave it to me and I gave it back to him at the vice squad.

Q. But you are not so sure, are you?

A. I know I had it at the vice squad. I went back and marked it and turned it over to Mr. Wells. [144]

Q. What kind of envelope did he put it in at the vice squad room?

A. I don't remember. I know I was marking the piece I had. There were other officers there I believe were doing the same thing. I marked it and turned it over to him, and I didn't pay any attention to what he was doing. I don't know what envelope.

Q. Were you present at the vice squad when

(Testimony of Hugh Whitford.)

Officer Wells put all these exhibits, pieces by pieces, or one by one, into envelopes? Were you present? You were weren't you?

A. I could have been there, yes.

Q. Don't you remember whether you were present or not when he put these important evidences into envelopes? Don't you remember whether you were there during that procedure or not?

A. I don't remember definitely, but I could have been there.

Q. Can you answer this: Did Mr. Wells put all these exhibits in similar envelopes, similar types of envelopes?

A. No, I wouldn't—

Q. You wouldn't know. How long did you search around the yard altogether after the struggle was all over? You searched around for a couple of hours, didn't you, the yard and the house?

A. Yes, we were there about an hour or a little better [145] than that.

Q. Between an hour and a half and two hours; isn't that right?

A. Could be. I am not positive. Could be.

Q. You got to the police station a little after 8 o'clock, didn't you?

A. About that time.

Q. Did you see Abbey blackjack the defendant's left hand at any time?

A. Left hand?

Q. Yes.

A. No.

Q. You didn't see that?

A. No.

Q. You only saw Officer Abbey blackjack the right hand?

(Testimony of Hugh Whitford.)

A. That's right, because I asked him to.

Q. Because you asked him to?

A. To help me open his right hand.

Q. Didn't you also order or request Office Abbey to blackjack and open his left hand?

A. No, I don't remember that.

Q. You definitely didn't do that?

A. I don't remember that.

Q. Did you dig around the back yard of the defendant's house? [146]

A. What was that question?

Q. Did you dig around the back yard, Captain Whitford, of the defendant's house?

A. No, I didn't dig around. I just pushed a few leaves on the side. The yard was covered with leaves.

Q. You didn't see the defendant fall on the bumper of the car at any time, did you?

A. Did I see him fall on a bumper?

Q. Yes.           A. No.

Q. Did you see the defendant hit his head on anything at any time?

A. No, I don't remember that.

Q. You never saw the defendant strike anyone at any time or punch anyone at any time, did you?

A. No.

Q. You don't know how the defendant sustained his injuries to his face and to his head, do you? That part you don't recall at all, do you?

A. I don't know.

(Testimony of Hugh Whitford.)

Q. Do you remember anybody calling the defendant "you goddam black son-of-a-bitch," or words to that effect? A. No.

Q. Would you deny that someone said such a thing or could have said such a thing? [147]

A. Oh, they could have, yes.

Q. They could have?

A. The fellows were talking.

Q. The fellows were talking, but you don't recall exactly what was said? A. That's right.

Q. Did you see Officer Shaffer give a choke hold on the defendant at any time, either this way or this way (indicating)? Officer Shaffer?

A. No, I don't remember that.

Q. You don't remember that? A. No.

Q. How long did the so-called subduing take altogether, about four or five minutes, I guess?

A. Four or five minutes.

Q. You are sure, aren't you, Captain Whitford, as the man in charge, that all six of you officers there engaged in the subduing of the defendant? Of that part you are sure, aren't you? You, Sousa, Sasaki, Wells, Shaffer; yourself, Shaffer, Sousa, Sasaki, Mr. Wells, and Abbey, all six of you took part in the subduing of this defendant; of that part you are sure, aren't you?

A. Well, we were all there. I believe they took part in it, too. I only can speak for myself, Mr. Wells, Sousa, I saw him there, and Abbey. Shaffer, I don't remember. Sasaki, [148] I presume he was there, too.

(Testimony of Hugh Whitford.)

Q. As to exactly what each officer did you are not quite sure? . A. No.

Q. Excepting some of Abbey's, I believe. Captain Whitford, going back to when you first came to the scene, do you remember seeing the defendant with his left hand on the door handle as he opened the door? Do you remember seeing that?

A. No.

Q. Was the door already open?

A. No, I don't remember. I couldn't see.

Q. You couldn't see that?

A. No. When I came around they were away from the car already.

Q. They were away from the car already?

A. They were a little ways off from the car.

Q. Do you remember if the defendant had anything like a key in his right hand or not, or with his right hand extended toward the switchboard or not? A. No, I don't remember that.

Q. You don't remember that? A. No.

Q. Do you remember, Officer Whitford, whether after it was all over you decided to go back to the police station, [149] whether you and your officers went to look for the defendant's keys on the grounds or not? Do you remember searching for his keys on the ground, the keys to the car that you confiscated?

A. No, I don't remember that either.

Q. Do you remember if Officer Wells went out and searched for the car keys or not?



(Testimony of Hugh Whitford.)

A. No, I don't remember that.

Q. You don't remember that at all?

A. No.

Q. Would you deny you had some trouble looking for defendant's car keys on the ground?

A. No, I don't deny it. I don't know. Like I say, it could have been; I don't remember it.

Q. You were there when the car was taken away, weren't you?

A. I don't believe I was. I believe I left there before the car was taken away.

Q. But you don't remember who went to search for the defendant's car keys? You don't remember?

A. No, I don't remember that.

Q. Well, the car keys were not in the car; is that right? That part you are sure of?

A. No, I don't know of that either.

Mr. Miho: One more question. No further questions, [150] your Honor.

The Court: Redirect examination.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: We will take our next recess, and have your next witness ready.

(Recess had.)

Mr. Miho: If your Honor please, at this time may we be permitted to recall Captain Whitford for one last question?



The Court: Any objection to this witness sitting here momentarily?

Mr. Miho: None at all.

The Court: Or just stand outside the door. Maybe that would be enough.

### HUGH WHITFORD

resumed the stand and testified further as follows:

#### Cross-Examination (Continued)

By Mr. Miho:

Q. Captain Whitford, you have been sworn; I would like to ask you: This Vicks inhaler tube, the portion of it that you obtained at the scene that we referred to and have been talking about——

The Court: Exhibit 3. [151]

Q. (Continuing): You marked it yourself at the vice squad station, you said, didn't you?

A. That's right.

Q. And you put your initials and the date and the time; is that right?      A. That's right.

Q. And the time was what time? The time you gave it to Mr. Wells at the vice squad station?

A. No, the time I picked it up.

Q. Where?      A. At the scene.

Q. At the scene?      A. That's right.

Q. At the time you marked it, you marked it in your vice squad room; is that right?

A. That's right.

(Testimony of Hugh Whitford.)

Q. And that was eight o'clock, or after eight, anyway?      A. About 8.

Q. When you said on this "5:45 p.m.," you were just guessing at the time you picked it up at the scene; is that right?

A. What do you mean guessing? That is the time at the scene.

Q. Guessing the time you picked it up at the scene.      A. 5:45 p.m. [152]

Q. In other words, you marked 5:45 p.m.

A. That's right.

Q. Where did you get that idea, 5:45? What made you put 5:45 on there?

A. That is the time I picked it up.

Q. At the scene?      A. That's right.

Q. What time did you make the raid?

A. About 5:40, somewhere around there.

Q. 5:40?      A. Yes.

Q. You looked at your watch and you figured 5:45 was about the time you picked up this stuff?

A. That's right.

Q. Actually you were guessing, weren't you?

A. Guessing?

Q. Yes.

A. I didn't need to guess. I had a watch with me. I knew the time.

Q. You were guessing at the time you marked it at 8 o'clock at the police station; isn't that right?

A. I was not guessing at the time. I had the time that I picked it up. That is the time I wanted to mark on this article here.

(Testimony of Hugh Whitford.)

Q. Did you tell us the other day that the struggle [153] might have continued five, ten, or fifteen minutes? Didn't you tell us that the other day?

A. I may have said that, yes.

Q. Well, when you say you picked up this stuff, Exhibit 3, after the struggle was over, after the struggle was over it was a minimum of five minutes or maximum of fifteen minutes; is that right? Or twenty minutes?

A. I said I took this thing out of his hands after we got his hands open. I got hold of it and took it from him, and then the struggle ceased right after that, shortly after that. That is what I recollect saying.

Q. You still say you weren't guessing?

A. No, I was not guessing.

Q. 5:45 is the time exactly when you picked it up?

A. That's right.

Mr. Miho: That is all.

Mr. Hoddick: No questions.

The Court: You are excused again.

(Witness excused.)

The Court: Call the next witness.

### ALFRED A. SOUSA

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name, age, residence, occupation and citizenship. [154]

(Testimony of Alfred A. Sousa.)

The Witness: Alfred A. Sousa, 31 years of age, American citizen.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Do you reside here in Honolulu?

The Witness: I do, sir.

The Court: Your occupation is——

The Witness: Sergeant in the vice squad.

The Court: Honolulu police department?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Sousa, how long have you been in the Honolulu police department?

A. About four years.

Q. And how long have you been assigned to the vice division? A. About three, sir.

Q. Do you know the defendant, Orestus Cavness? A. I do, sir.

Q. Will you identify him, please; point him out?

A. (Indicating): There is Orestus Cavness.

Q. The man on the end of the bench?

A. That's right, sir. [155]

The Court: What bench?

Mr. Hoddick: May the record show he has identified defendant. The end of Counsel table.

The Court: Yes.

(Testimony of Alfred A. Sousa.)

Q. (By Mr. Hoddick): Mr. Sousa, did you have occasion to make a raid on the defendant's house any time in July, 1949?

A. Yes, I did.

Q. And just when was that raid made?

A. July 19, 5:40 p.m.

Q. And where were you immediately prior to the making of the raid?

A. Reserve Officer Abbey's home.

Q. And where is Reserve Officer Abbey's home?

A. Right across the street from the defendant's home.

Q. What is the defendant's address?

A. 3811 Leahi Avenue.

Q. How long had you been in Officer Abbey's home prior to making the raid?

A. Several hours.

Q. Who was there with you?

A. The rest of the raiding party.

Q. Do you remember their names?

A. Agent Wells, Officer Shaffer, Sergeant Sasaki, Captain Whitford, Officer Abbey, and myself.

Q. Will you describe to the Court and jury what happened [156] after the raiding party left Officer Abbey's house at approximately 5:40 p.m. on July 19, 1949.

A. What everyone did, sir?

Q. Yes, what you saw.

A. I seen the defendant drive in his driveway.

(Testimony of Alfred A. Sousa.)

Agent Wells went out of the house first, approached the car on the driver's side, which is the left side of the car. I was about eight feet or more behind Agent Wells, and I could see him with his left hand out, having his badge in his left hand and a piece of paper in his right, approach on Calvet's side of the car.

Q. Whom do you mean by Calvet?

A. Cavness, the defendant, sir. The door was partly open, as far as I recall. I noticed Cavness come out of the car and shove Agent Wells.

Q. Do you remember which hand he shoved Wells with?      A. With his left hand, sir.

Q. And do you remember what part of Wells' body he shoved?

A. It was the upper portion of Agent Wells. I don't know what the exact spot would be.

Q. Do you remember what result that shove had on Wells?

A. Agent Wells lost his balance, but at no time did Agent Wells lose contact, as far as I could see, with the defendant. [157]

Q. And what did you do when you saw the defendant shove Mr. Wells?

A. I immediately ran toward the defendant and grabbed his right arm. There was a tussle there. The defendant fell and got up again. He went to the front of the car, fell there, came pretty close to the bumper and fender of the car. He stood up, and in the meantime Captain Whitford came by,

(Testimony of Alfred A. Sousa.)

and we all struggled to subdue the defendant.

Q. Did the defendant hit the car when he fell?

A. Very possible that he did. I did not see it. It is very possible that he could have hit the car.

Q. Go ahead.

A. The struggle lasted a matter of three or four minutes, maybe longer, maybe less. In the meantime the rest of the raiding squad had arrived at the scene.

Q. What do you mean "the rest of the raiding squad"?

A. The other boys besides Captain Whitford, Agent Wells, and myself.

Q. You mean the other boys who were in Abbey's house?

A. That's right, sir. I remember Agent Wells saying, when Calvin first got out of the car, that he had it in his right hand.

Q. That is when you were running up to assist?

A. That is when I was running up to the car behind Agent Wells, and I grabbed his right hand, and he tried to put his [158] right hand up towards his mouth, to the front of his face, that motion (indicating), with his hand up.

Q. You say the struggle lasted for three or four or maybe more minutes?

A. That's right.

Q. Did you and the other officers have any difficulty in subduing the defendant?

A. Yes, we did; the defendant was very powerful. It seemed to me that the defendant was "hopped up."



(Testimony of Alfred A. Sousa.)

Mr. Miho: I move that answer be stricken, if your Honor please.

The Court: Definitely.

Mr. Miho: It being highly prejudicial, entirely uncalled for, and unresponsive, and unfair.

The Court: Definitely it may go out, and the jury is instructed to disregard it. Just answer the question that is asked you.

Mr. Miho: And I would like to reserve any motion at this time for any motion for a mistrial, if your Honor please.

The Court: Well, what do you mean "reserving it"?

Mr. Miho: If I decide after conference with my associate that it merits my asking for a mistrial, his making that statement, at this time, I would like the opportunity to make it at a later time. [159]

The Court: You may, but I would like you to make up your mind by tomorrow morning as to what you wish to do on that score.

Q. (By Mr. Hoddick): What happened after the defendant was subdued?

A. After the defendant was subdued?

Q. What did you do?

A. Well, I kept holding onto him as he was trying to get away at all times during the struggle. I don't know exactly what part of the body I was hanging onto after the struggle had begun. I know I was in contact with him practically all the time.

Q. And what did you do after he was subdued?

(Testimony of Alfred A. Sousa.)

A. After he was subdued and handcuffed, then I went to Officer Abbey's house and called the rest of the searching party to come over. They arrived shortly after.

Q. You called them on the telephone?

A. I called them on the telephone, yes, sir.

Q. When you got back over to the defendant's house, where was the defendant, and the other officers?

A. Will you repeat that again, sir?

Q. When you went back to the defendant's house from Abbey's house after having made the telephone call to the other members of the party, where was the defendant and where were the officers? [160]

A. The defendant was out in the yard and the officers also was out there.

Q. And were all the officers there?

A. As far as I recall.

Q. And what were they doing in the yard?

A. They were standing around the capsules that was in the yard there.

Q. Did you see anybody pick those capsules up?

A. No, I don't remember who picked them up.

Q. Did the party go in the house after that?

A. Yes, sir.

Q. At that time was the defendant formally placed under arrest? A. I don't remember.

Q. You don't remember. Did you participate in the search of the premises?

(Testimony of Alfred A. Sousa.)

A. Yes, very little.

Q. Did you find anything?

A. No, I didn't.

Q. Did you go down to the vice squad with the other officers?      A. Yes, I did.

Q. After the raid?      A. Yes, I did.

Q. About what time was that? [161]

A. That was about an hour after.

Mr. Hoddick: Could I have a moment of the Court's time, please.

The Court: Yes.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

### Cross-Examination

By Mr. Miho:

Q. Officer Sousa, you are no expert on narcotics, are you?      A. I don't claim to be, sir.

Q. You are just a plain officer of the law in the Honolulu Police Department; is that right?

A. I am an officer of the law, yes, sir.

Q. In the vice squad?      A. Yes, sir.

Q. When you went up to Officer Abbey's house, how many of you went to his house?

A. The ones that I mentioned a little while ago.

Q. Six of you altogether?

A. If that was six, yes.

Q. And you stayed at the house for about two hours or more or less?

A. About that, sir.

(Testimony of Alfred A. Sousa.)

Q. You had some drinks in that house? [162]

A. Water.

Q. What is that? A. Water.

Q. Ice water? A. Ice water, tap water.

Q. How tall are you, Officer Sousa?

A. Six and one-fourth, sir.

Q. How many pounds do you weigh?

A. A little over 200 pounds.

Q. A little over 200 pounds?

A. Yes, sir.

Q. You are not afraid of any man, living or dead, are you? A. I am not.

Q. You were well on that day of the raid, as you call it? A. Yes.

Q. You weren't sick or anything?

A. No, sir.

Q. You were eight feet behind Agent Wells as he went towards the defendant?

A. Approximately, sir.

Q. You were the first officer behind Agent Wells?

A. There was—Well, may I answer different. There was Captain Whitford behind Agent Wells, and I was on the left, [163] as far as I recall, of Agent Wells.

Q. Where was Captain Whitford?

A. Captain Whitford was behind Agent Wells when they came out of the house.

Q. Where was he as you got into the defendant's yard?

(Testimony of Alfred A. Sousa.)

A. Captain Whitford went to the right of the car.

Q. Right of the car? A. Yes, sir.

Q. And Agent Wells went to the left of the car? A. That's right.

Q. And you were behind Agent Wells about eight feet? A. That's right.

Q. There was no one between you and Agent Wells at the time you proceeded into the defendant's yard? A. That's right.

Q. And as Agent Wells went up to the defendant's left front door, you were still about six to eight feet behind Agent Wells?

A. About that, sir.

Q. At that time, as Agent Wells went up to the defendant's left door and as the defendant came, it all occurred almost simultaneously; **is that right?**

If I may go over that again: You saw the defendant drive into his driveway and then you all came out. Agent Wells proceeded toward the front of the defendant's car. Defendant's [164] car stopped. Agent Wells reached the front just about the time the defendant stopped his car; **is that right?**

A. That is close enough.

Q. And then you saw the defendant's door open, didn't you? A. That's right.

Q. And you saw the defendant's left foot come out, partially out of the front door?

A. No, I didn't see it coming out. When I noticed, his foot was outside already.

(Testimony of Alfred A. Sousa.)

Q. When you noticed, his foot was outside already?  
A. Yes, sir.

Q. At that time did you see the defendant with his left hand on the door handle, or any part of that left front door?

A. That I don't remember, sir.

Q. You don't remember?  
A. No, sir.

Q. Agent Wells was not the one who opened the defendant's left front door, was he?

A. Not that I recall.

Q. And you were in a position to see everything clearly, what Agent Wells did, weren't you?

A. Just about, sir.

Q. So you are positive Agent Wells was not the one who opened the defendant's left front door? You are sure of that [165] point, aren't you?

A. Will you repeat that question?

Q. You are sure Agent Wells never opened the defendant's left front door; isn't that right?

A. I couldn't say, because I didn't see.

Q. Weren't you in a position right behind Agent Wells, six to eight feet, in a position to observe what Agent Wells was doing?

A. That's right, sir.

Q. And still you don't know whether he opened the left front door of the defendant's car?

A. That's right, sir.

Q. You are not sure; is that what you are trying to tell us?  
A. I didn't see it.

Q. I am asking you whether Agent Wells opened that door or not.



(Testimony of Alfred A. Sousa.)

A. Well, if I didn't see it, I don't know whether he did or not.

Q. So when you saw anything, the door was already open? A. That's right, sir.

Q. Did you see the defendant's left hand on the door handle? A. No, sir.

Q. Did you see his left hand on the door at any portion? [166] A. No, sir.

Q. You didn't. Did you see the defendant's right hand extended to the front?

A. As the defendant came out of the car, I seen the defendant's right hand go up towards his face.

Q. Towards his face? A. That's right.

Q. He was already out of the car at that time?

A. Practically all out.

Q. And you grabbed his right arm; right?

A. Yes, when I reached him.

Q. You were the first to grab his right arm?

A. Yes, when Agent Wells said he had it in his right hand.

Q. But you were the first to grab the defendant's right arm. A. Yes, sir.

Q. And you say that one of the first things you noticed was defendant pushing Agent Wells?

A. Shoved him.

Q. Shoving him. You show us how he shoved him, with your left hand.

A. (Indicating).

Q. Toward the front this way (indicating), or toward the side? [167]



(Testimony of Alfred A. Sousa.)

A. Defendant was sitting in his car this way (indicating), and as he came out, that motion (indicating).

Q. He shoved him like that?

A. That's right.

Q. What part of Mr. Wells' body?

A. Upper portion. I don't know whether it was there (indicating) or here (indicating), or on the neck, or in the middle of the chest, some upper part.

Q. He pushed him through the car door, the open part?

A. No. By the time the defendant came out of the car, the door was open and he shoved Agent Wells.

Q. You are sure the door was not the part that hit Agent Wells?

A. No; I am sure of that.

Q. Of that part you are sure?

A. Yes, sir.

Q. The rest you are not?

A. I am sure of everything I said.

Q. You are sure of everything you said excepting what you don't know; is that right?

A. That is right.

Q. Or what you don't want to know?

A. What I don't know, I don't know, sir.

Q. Are you sure that this man here shoved Agent Wells somewhere on his body? [168]

A. That's right, sir.

(Testimony of Alfred A. Sousa.)

Q. And Agent Wells staggered bodily, fell off balance, you say?

A. He was off balance.

Q. How many feet did he go off balance?

A. A matter of one foot, two feet.

Q. A matter of one foot, two feet. What do you mean, that Agent Wells never lost contact at any time with the defendant?

A. I meant that Agent Wells was with the defendant at all times.

Q. What do you mean "lost contact," that he never "lost contact" with the defendant?

A. That is right. Part of his body was in contact with the defendant's body.

Q. You mean Agent Wells was hanging onto the defendant's arm at all times?

A. I don't know whether he was hanging to his arm, his coat, his shirt, his pants, but I know he didn't lose contact. They were close together.

Q. Close together?           A. That's right.

Q. And you were hanging onto the defendant's right arm by that time?

A. That's right, sir. [169]

Q. How did you hold his right arm? You demonstrate on me.

A. Do you want me to demonstrate again?

Q. Defendant was out of his car?

A. That's right, sir.

Q. And defendant was facing which way, if the car was here (indicating)?

(Testimony of Alfred A. Sousa.)

A. The car facing makai.

Q. So the jury can see better, let's say the car was facing this way (indicating).

A. Let's say this is the Koko Head Ewa (indicating). The driveway runs makai. All right, he got out of the car this way (indicating) in stooping position. I ran up and grabbed his hand in this position (indicating).

Q. Well, similar to that. The similar part or the whole part?

A. I don't know exactly. I grabbed his right hand. I don't know whether it was this way (indicating) or this way (indicating) but he shoved his right hand up towards this way (indicating).

Q. Then what did you do next?

The Court: Speak louder.

A. As I grabbed his right arm, he went down on his knee.

Q. You didn't push him by any chance? [170]

A. I didn't push him, but when I grabbed him, by my force naturally we went forward.

Q. Then what happened?

A. He stood up again and came towards the front of the car again. I still hung onto him and went down again, and at that time I don't know what part of his body I held. Captain Whitford came. He struggled.

Q. Did he hit the bumper with his head?

A. Very possible. I don't know whether he did or not.

(Testimony of Alfred A. Sousa.)

Q. But you are not dead sure? A. No, sir.

Q. And Captain Whitford came to the rescue?

A. That's right.

Q. What did Captain Whitford do?

A. What he did I don't know.

Q. Don't you? A. No, sir.

Q. Didn't Captain Whitford grab hold of his right arm, too? A. Probably did.

Q. But you are not sure?

A. I don't know what Captain Whitford did.

Q. You don't know what Captain Whitford did at all?

A. I know he was there on the raid and assisted the rest of us, Agent Wells and myself, to subdue the defendant, but [171] I don't know what part of his body Captain Whitford grabbed the defendant.

Q. You don't know whether Captain Whitford grabbed hold of the defendant's right arm, together with you, or not? A. No.

Q. You don't know that? A. No, sir.

Q. Did he or didn't he?

A. I can't answer that. I don't know.

Q. You don't know, but you are sure you were grabbing onto the defendant's right arm?

A. I know what I was doing.

Q. You grabbed hold of his right arm?

A. Right.

Q. Defendant finally went flat on his stomach; is that right? A. Yes, he fell.

(Testimony of Alfred A. Sousa.)

Q. Flat on his stomach?

A. That's right.

Q. Agent Wells was still hanging onto his left arm?

A. I don't know.

Q. You don't know that either?

A. No.

Q. What was Sasaki doing, by any chance?

A. I don't know. [172]

Q. What was Abbey doing, by any chance; you don't know that either?

A. No, sir.

Q. Did any of these other officers take part?

A. Sure, they all did.

Q. But you don't know what they did?

A. No.

Q. You don't know who hit him on the back of his head, if anybody did?

A. No, sir.

Q. You didn't do that?

A. No, sir.

Q. You didn't see anybody punch him on his face?

A. No, sir.

Q. Maybe he punched his face on the bumper; is that right?

A. Could be.

Q. Or the coconut tree?

A. Could be.

Q. He had contusions on his right cheek, didn't he? Bruises on his right cheek and right eye?

A. That I don't know. I know as far as the picture I see in front of me now, he had a bruise below his left cheek, right about here (indicating).

Q. Are you sure it was the left cheek? [173]

A. As far as I can see in my mind.

Q. That bruise was there, but you don't know how he got it?

A. No, I don't.

(Testimony of Alfred A. Sousa.)

Q. But you didn't do it?

A. He must have got it in the struggle. But I say he put up a very good struggle.

Q. Very good struggle?

A. Very good. He put up a very good struggle.

Q. You never saw him hit anybody, did you, or punch anyone?

A. The defendant?

Q. Yes.

A. Not that I recall, sir.

Q. He just struggled?

A. That's right.

Q. Struggled against you six small men, six small—I mean pretty big men?

A. He was very powerful.

Q. You hung onto his right arm. He was flat on his back. You don't know what the other officers did, especially what Captain Whitford did, but anyway you were hanging onto his right arm?

A. I was hanging onto his right hand, but as I say, after he fell about the second time, as I mentioned here, I had some [174] part of his body.

Q. You let go of his arm at that time?

A. I don't recall that. I might have hung on his right hand, I might have had him by the shoulder with my one hand on his right hand. Everything happened so fast, and action was taking place all the time.

Q. Do you remember seeing anyone blackjack his right hand, or don't you recall that?

A. No, I don't recall that.

Q. Did you have a blackjack in your hand on that day?



(Testimony of Alfred A. Sousa.)

A. No, I didn't have no blackjack with me that day.

Q. You vice squad men ordinarily go around carrying blackjacks; you are authorized to carry blackjacks?      A. Sure.

Q. But on that day you didn't have any?

A. No.

Q. Brass knuckles?      A. No, sir.

Q. You don't know what happened after you let go of his right arm; you just know you hung onto some part of the defendant's body?

A. That's right, sir.

Q. And that he was subdued soon after that?

A. Yes.

Q. Did you see anybody pick anything out of either one [175] of his hands?

A. Pick something out of his hands?

Q. Did you see anyone pick anything out of his hands at all on that occasion?      A. No, sir.

Q. Did you see someone pick something up from the ground later on?

A. I know something was on the ground later on. I don't know who picked it up.

Q. Did you see this at the scene at any time, referring to Exhibit 3, your Honor?

A. That's right, sir.

Q. Who picked that up? You? Take a good look at it. Take all the time you want.

A. I think it was Captain Whitford.

Q. He picked that up? Was it after the struggle was over, or not?



(Testimony of Alfred A. Sousa.)

A. Just about the time the struggle was over.

Q. He picked it out of the ground; is that right?

A. I don't recall that. I don't know.

Q. You don't know. But you are sure you saw him pick up this particular piece?

A. I seen Captain Whitford with it.

Q. Pick it up?

A. Well, I don't know whether he picked it up or took [176] it out of his hand.

Q. If he picked it out of his hand, you could have seen it; you were in a position to see it, weren't you?

A. No, sir.

Q. You don't know. You don't know whether Captain Whitford picked it off the ground or not, either?

A. No, sir.

Q. But you are sure Captain Whitford——

A. I seen Captain Whitford with it.

Q. (Continuing): ——picked it up at the scene?

A. I seen Captain Whitford with part of the inhaler.

Q. Where was the first time you saw Captain Whitford with part of this inhaler?

A. Right in the defendant's yard.

Q. Yard or house?           A. Yard.

Q. Yard?           A. Yes, sir.

Q. After the defendant had already been subdued?

A. Yes, sir.

Q. Did he say anything at that time?

A. Who, sir?

(Testimony of Alfred A. Sousa.)

Q. Whitford.           A. I don't remember.

Q. Now, when you say that you saw someone, when you [177] went to call the rest of the vice squad gang and you came back from Abbey's house to the scene, you saw all of the officers gathered around by the coconut tree or near it?

A. Some of the officers were still outside.

Q. And you saw who pick up what?

A. I don't know who picked it up.

Q. Picked up what?           A. The capsules.

Q. You don't know who picked it up?

A. I don't remember. I know someone did, but I don't know who did.

Q. You were right there?           A. Yes.

Q. But you don't know who picked it up?

A. Yes.

Q. But you are sure all of the officers were there, all six of you? The rest of the officers hadn't joined you yet, Roberts and the rest of them?

A. No.

Q. Do you remember whether Captain Whitford had this Exhibit 3 in his hand at that time, or whether he picked it off the ground at that time?

A. No, I don't recall that.

Q. In other words, you don't know when Captain Whitford picked this up? [178]

A. That's right.

Q. You don't know who picked up the six capsules; right?           A. At that time, no, sir.

Q. When was the next time you saw this Exhibit 3, part of that inhaler I just showed you?

(Testimony of Alfred A. Sousa.)

A. Right outside in the yard.

Q. When was the next time you saw it? Where was it when you next saw that part of the inhaler tube?

A. I seen it right along.

Q. Who had it?

A. As far as I know, Captain Whitford.

Q. Was he showing it around to people?

A. Yes.

Q. To the officers?

A. Yes, sir.

Q. At the scene?

A. At the scene.

Q. In the house?

A. Very possible.

Q. At the police station?

A. That I don't know.

Q. He never gave this piece to you at any time for personal and closer observation, did he?

A. Not that I recall.

Q. He never gave this Exhibit 3 to Mr. Shaffer, by any [179] chance, handing it over like that (indicating) for close observation, did he?

A. I don't know, sir.

Q. You don't know?

A. No, sir.

Q. Did he give this to Agent Wells for close observation, or for any other purpose?

A. Possibly.

Q. At the scene?

A. Possible, sir.

Q. Possible?

A. Yes, sir.

Q. But you don't know that either?

A. No, sir.

Q. The defendant was handcuffed soon after he was subdued?

A. That's right, sir.

(Testimony of Alfred A. Sousa.)

Q. By whom? A. I don't remember.

Q. Was he handcuffed to anyone, do you remember?

A. No, sir, out in the yard he was not.

Q. What is that?

A. Out in the yard he was not.

Q. He was not handcuffed in the yard at any time? A. Not to anyone else.

Q. Was he handcuffed to himself? [180]

A. Yes, sir.

Q. In what position? Like I am here (indicating)? A. That's right, sir.

Q. Did you notice any bleeding on the back of his head at that time?

A. No, not at that time. I noticed the bleeding on his lips.

Q. But you never noticed the bleeding on the back of his head? A. Not at that time, sir.

Q. Who brought him into the house? Officer Abbey? Agent Wells? Captain Whitford?

A. I know Agent Wells took him to the house.

Q. Captain Whitford, too?

A. And Captain Whitford went in the house, yes.

Q. And how about Sasaki?

A. I don't remember who else went in, sir.

Q. There were more than two officers that went into the house; isn't that right? A. Yes.

Q. Did Officer Abbey go to the house, too?

A. I don't know.

(Testimony of Alfred A. Sousa.)

Q. Did you go into the house?

A. Yes, after a while.

Q. After what while? [181]

A. About five minutes.

Q. After you made the call?

A. After I made the call, and I still stayed outside.

Q. Well, did you go into the house after you made the call? When was the first time you went into the house, soon after Cavness was handcuffed after being subdued?

A. When Cavness was subdued, that is when I went to make the 'phone call.

Q. Right after that you immediately went to make the 'phone call? A. Yes.

Q. How long did that operation take?

A. Two or three minutes; maybe less.

Q. How far is Abbey's house from the defendant's house? A. Across the street.

Q. How many feet from where you are sitting? To the end of that building (indicating)?

A. Maybe a little less than that.

Mr. Miho: Will you stipulate, Mr. Hoddick, it is about a hundred feet.

Mr. Hoddick: I don't know how far it is, Mr. Miho.

Q. (By Mr. Miho): It is about a hundred feet, isn't it?

A. I don't know how many feet, but it is not that far, not right to the end of the building there. It is about three-quarters way. [182]

(Testimony of Alfred A. Sousa.)

Q. Well, anyway, it is longer than from that wall to this wall? A. Naturally.

Q. About half as long as it is from that distance from one wall to the other?

A. This wall to the other and a little more.

Q. Half that? A. About that, sir.

Q. And you did that, back and forth in making the 'phone call, in two minutes or less?

A. About three minutes or less.

Q. And then you came back and you saw these officers standing around where the struggle had occurred? A. Yes.

Q. And the defendant was there? A. Yes.

Q. And then Shaffer or someone picked up something?

A. I don't recall who picked up something at that time.

Q. Are you sure it was at that time someone picked up something?

A. I seen the capsules down myself on the ground.

Q. You saw them yourself? A. Yes.

Q. The six capsules?

A. Capsules. I don't recall how many at this time. [183] The capsules were down on the ground.

Q. What part of the ground?

A. What do you mean, "What part of the ground"?

Q. What part of the ground? What part of the ground?

(Testimony of Alfred A. Sousa.)

A. I don't quite follow you there, sir.

Q. Where did you see these capsules?

A. On the ground.

Q. Where? What part of the ground?

A. You mean on the grass? On the dirt?

Q. Yes. A. On the grass.

Q. On the grass? A. Yes.

Q. In front of the car?

A. If I recall correctly, it was on the side of the car.

Q. Inside of the car? A. Beside the car.

Q. Beside the car? A. Yes.

Q. Right by the front door?

A. One door, yes, approximately right by the door.

Q. The front left door? A. Yes.

Q. That is where you found them? That is where you saw [184] them the first time?

A. As I say, I am not too positive about that, but I know it was down on the ground.

Q. Down on the ground? A. Yes.

Q. What else did you see, by any chance?

A. I saw the part of a Vicks inhaler tube right next to the coconut tree.

Q. You mean this part here, Exhibit 3?

A. No, sir.

Q. Which part? Any particular part of the Vicks inhaler tube? These pieces here? Take a good look at it. Take it out. A. No.

Q. Not these pieces? A. No, sir.



(Testimony of Alfred A. Sousa.)

Q. Did you see these pieces, Exhibit 1, at any time at the scene?

A. Yes, I seen those at the scene.

Q. Where did you first see them?

A. On the ground. Someone's hand.

Q. Well, the first time you saw it was where?

A. I don't recall.

Q. Who picked these up? Did you?

A. No, sir. [185]

Q. Who picked them up?

A. According to that it is Paul Shaffer.

Q. According to this, Paul Shaffer. You saw the initials? A. That's right, sir.

Q. Is this the piece you mean that you saw there? A. Yes.

Mr. Miho: May the record show he refers to Exhibit 2.

The Court: Is that the whole exhibit?

The Clerk: 2-B.

Mr. Miho: 2-B.

The Court: Is that the whole exhibit?

The Clerk: There are three parts.

The Court: What is the third part?

The Clerk: The laboratory card.

Q. (By Mr. Miho): Is that the piece?

A. Yes.

Q. You saw the capsules—When you saw the capsules, you saw this piece at the same time?

A. This was inside.

Q. Yes, this was inside.

(Testimony of Alfred A. Sousa.)

The Court: Speak louder, please.

The Witness: The capsule was inside.

Q. (By Mr. Miho): You saw this and you saw the six or [186] four, whatever capsules, some capsules lying close to each other?

A. No, this was by the coconut tree.

Q. Where were the other pieces?

A. Oh, a matter of maybe about three feet away.

Q. Three feet away?

A. Three or four feet.

Q. By the side of the front left door?

A. Side of the car, yes, sir.

Q. Who picked this up, Exhibit 2-B?

A. Officer Abbey.

Q. Officer Abbey picked it up?

A. Yes, sir.

Q. That you remember?

A. That I remember.

Q. And what did he do after he picked it up?

A. He didn't pick it up. He called Agent Wells, that inhaler tube right by the coconut tree.

Q. Agent Wells was in the house, you mean, at that time? Where did he call him from?

A. I think Agent Wells was out in the yard at that time when he pointed to the cap at the bottom of the coconut tree.

Q. Mr. Sousa, you weren't even around when Officer Abbey saw this particular piece, Exhibit 2-B? [187]

A. Sure, I was around.

(Testimony of Alfred A. Sousa.)

Q. And you say he called for Agent Wells?

A. That is the regular routine.

Q. I am not talking about any regular or irregular routines. I am asking you what happened on that occasion.

A. Yes, sir, he called Agent Wells.

Q. And where did Agent Wells come from, if you saw that?

A. I don't know where he came from.

Q. You don't know where he came from?

A. No, sir.

Q. But Agent Wells came?

A. That's right, sir.

Q. And Agent Wells picked it up; is that right?

A. As far as I know, Officer Abbey—He called Agent Wells, and Officer Abbey picked it up and handed it to Agent Wells.

Q. Handed it to Agent Wells?

A. As far as I recall, yes.

Q. You never saw Officer Abbey put this Exhibit 2-B in his pocket or any place on his person?

A. No, sir.

Q. He just handed it over to Agent Wells?

A. That's right, sir.

Q. That is the last you saw? [188]

A. Yes, sir.

Q. What else did you see?

A. What else?

Q. Yes, if anything.                   A. I don't remember.

Q. What is that?                   A. I don't remember.

(Testimony of Alfred A. Sousa.)

Q. All right. Then what did you all do? You saw these six capsules, or five capsules, or four—you don't know how many you saw—then you saw somebody pick them up—you don't know who picked them up.

A. That's right.

Q. You saw this other Exhibit 2-B; you say you saw it; Abbey called Agent Wells, who came from some place; Abbey picked it up handed it over to Agent Wells; and that is the last you saw of that Exhibit 2-B?

A. That is what I recall.

Q. Just the part with the so-called annexed capsules stuck together?

A. That's right, sir.

Q. When was the next time you saw Exhibit 2-B?

A. I don't remember.

Q. Weren't you at the police station in the vice squad room?

A. Yes, sir.

Q. Weren't you there when Agent Wells was putting these [189] exhibits into different envelopes?

A. Yes, now I recall it.

Q. And where did you see Agent Wells pick that 2-B out of, that important piece, as you call it, of evidence; where did you see him get it out of; what pocket?

A. I don't remember that, sir. I don't remember what pocket.

Q. But did you notice Agent Wells putting that particular piece in an envelope?

A. No, I don't remember that.

Q. You don't remember that?

A. I don't know what envelope he put it in. I don't recall him putting it into an envelope.

(Testimony of Alfred A. Sousa.)

Q. Do you recall seeing Agent Wells putting anything in an envelope in your presence at the vice squad room, in Captain Whitford's office?

A. No, sir, I probably forgot about it.

Q. You probably forgot about it?

A. That's right, sir.

Q. But you were there? A. I was there.

Q. But it is a complete blank to you what Agent Wells did with relation to these exhibits?

A. That's right, sir.

Q. You don't know who handed him what exhibit, what [190] part of his body or pocket he pulled it out of? A. That's right, sir.

Q. You never saw Abbey give him anything at the police station, at Captain Whitford's office?

A. Not that I recall.

Q. Did you see Shaffer give anything to Agent Wells at the police station? A. I don't recall.

Q. Did you see Captain Whitford give him anything at the police station?

A. I don't know that.

Q. Would you deny one way or the other? Tell us.

A. If I don't know, I can't tell you one way or the other.

Q. You just don't know?

A. That's right, sir.

Q. But you saw Agent Wells putting stuff in an envelope, in envelopes, different kinds of envelopes, at the vice squad room; do you remember that?

(Testimony of Alfred A. Sousa.)

A. I don't know whether I did or not, sir.

Q. Well, you said a while ago you were there.

A. Yes, I was there, yes, sir.

Q. You were there?

A. I was at the vice room.

Q. And you saw Agent Wells putting exhibits into [191] different envelopes?

A. I don't remember that, sir. You recall, sir, the vice room has different partitions.

Q. I haven't seen your new, exclusive headquarters, Officer. You have a new one now, a higher class one than the one you used to have before. You have a new building, haven't you? The old one burned down, didn't it?

A. That's right, sir.

Q. Officer Sousa, you remember the mock orange fence that is on the front of Cavness' house?

A. You mean the hedge, sir?

Q. Yes, mock orange hedge.

A. That's right, sir.

Q. How tall is that hedge? About as tall as you are; is that right?

A. Maybe a little taller.

Q. Maybe a little taller?                      A. Yes, sir.

Q. And all interwoven and thick; is that right?

A. It is pretty thick, yes, sir.

Q. Could you walk through that hedge, or either part of that hedge, left part or right part of that hedge? Could you walk through it? You can't, can you?

A. Not without a struggle.



(Testimony of Alfred A. Sousa.)

Q. Your clothes would probably be torn up, wouldn't [192] they?

A. I wouldn't say that, sir.

Q. It is pretty thick, isn't it?

A. It is pretty thick.

Q. Would you dive through that hedge? Could you? Do you think you can dive through that hedge? A. Sure.

Q. You can? A. Sure.

Q. What part of that hedge? A. Any part.

Q. And come out standing up from the other side? A. That I don't know.

The Court: Excuse me. Are you going to have many more questions? The reason I ask is that if you have just a few, we can stay and finish with this witness, unless Mr. Hoddick has further questions.

Mr. Miho: I might wait until tomorrow. If your Honor please, in justice to the defendant—I have talked to Mr. Ahrens—we are of the opinion that it would be very helpful to the entire case if the jury and your Honor would take an inspection trip of the scene. It is not too far, if your Honor please.

The Court: All right. Suppose you and Mr. Hoddick see me in chambers right now and we will discuss it. [193]

Until 9 o'clock tomorrow morning.

(Thereupon, at 4:05 p.m., December 12, 1949, an adjournment was taken until December 13, 1949, at 9:00 a.m.)



December 13, 1949

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness, for further trial.

Mr. Miho: Ready for the defendant.

The Court: We are a little late starting this morning. Our apologies to anyone we have kept waiting, which includes the jury. Are the parties now ready to proceed?

Mr. Miho: Yes, your Honor.

Mr. Hoddick: Ready for the plaintiff, your Honor. I believe it is going to be necessary for Mr. Miho and myself to present argument to your Honor on the question we have been considering. I presume that should be done in the absence of the jury, if your Honor wants to consider that question at this time.

The Court: Very well. I will at this time excuse the jury and hear argument on a motion. So gentlemen, if you will step outside for a few minutes——

Mr. Hoddick: If your Honor please——

The Court: Just a minute. The record may reflect that the jury is now out of the court room and out of the hearing of that which transpires in the court room. The defendant is present and you, Mr. Miho, are about to present your motion for a mistrial.

(Argument by Counsel in the absence of the jury.) [195]

(Motion for mistrial, referred to on page 159 of the transcript, denied.)

(Exceptions taken.)

(Jury returns.)

Mr. Miho: May I note for the record, if your Honor please, that the defense excepts to your Honor's ruling on the motion for a mistrial for the reasons stated in the absence of the jury.

The Court: Yes. The exception being noted, the jury now being present, and the defendant also, the trial may proceed.

### ALFRED A. SOUSA

resumed the stand and testified further as follows:

The Court: Mr. Sousa, you are the same Mr. Sousa who heretofore has testified in this case?

The Witness: I am, your Honor.

The Court: I remind you that you are still under oath. You may take the witness.

Mr. Hoddick: I believe the witness was on cross-examination.

The Court: Cross-examination, yes.

### Cross-Examination

(Continued)

By Mr. Miho:

Q. Officer Sousa, after the raid was all over and the defendant had been subdued, do you remember any officers' [196] going into the defendant's yard and looking for the car key, the defendant's car key, to the Hudson car?

A. No, sir, I don't remember that.

(Testimony of Alfred A. Sousa.)

Q. You don't remember that?

A. No, sir.

Q. Do you remember who drove the car away, the car that was confiscated, the Hudson car?

A. I am not sure, but I think it was Officer Pestano.

Q. Pestano. But you don't remember anyone going around looking for the key to the car?

A. No, sir.

Q. On the ground? A. No, sir.

Q. By the way, have you talked about this case to anyone, discussed this case with anyone since the time of the raid? A. What?

Q. Have you discussed this case with anyone since the raid?

A. With those that haven't testified.

Q. Only with those that haven't testified?

A. Before—prior to the time I took the stand?

Q. Yes. A. Yes.

Q. Whom did you discuss it with, or you didn't? What [197] are you trying to say?

A. I am trying to say before I took the stand, and the boys who didn't take the stand, we talked the case over.

Q. But with those fellows who took the stand you didn't discuss the case? A. No, sir.

Q. At any time since the raid?

A. That's right, sir.

Q. You are with them all the time, aren't you?

A. Yes, sir.

(Testimony of Alfred A. Sousa.)

Q. You see them every day, practically?

A. Just about.

Q. But you didn't discuss the case with them?

A. No, sir.

Q. Didn't discuss the case with Mr. Wells either?

A. No, sir.

Q. You didn't discuss the case with Mr. Hoddick?

A. Beg pardon?

Q. You didn't discuss the case with Mr. Hoddick, the man sitting on the right of Mr. Wells?

A. I talked to Mr. Hoddick.

Q. Before the trial? A. Yes.

Q. But the other officers and Mr. Wells, you didn't discuss this case at all? [198]

A. I didn't discuss the case, no, sir.

Q. I want to call your attention to your statement again that you were standing around and all the other officers were standing around when the six capsules were seen. You told us that yesterday.

A. I was standing around.

Q. And did you also——

Mr. Miho: Withdraw the question.

Q. (By Mr. Miho): Was the defendant present, or not, at that time?

A. Yes, sir.

Q. He was present? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Who was standing by him?

A. I don't recall.

Q. Was the defendant handcuffed?

A. I don't remember that, whether he was handcuffed at that time or not.

(Testimony of Alfred A. Sousa.)

Q. Was he still bleeding or had he taken care of his bleeding with a towel or something, and how was his face with relation to blood?

A. If I recall correctly, I think there was some blood still coming out of his lip. [199]

Q. Still coming out? A. Yes.

Q. How about the back of his head?

A. I don't remember that, whether the blood was coming out of the back of his head or not.

Q. And you say the defendant was standing?

A. Yes.

Q. So that when you came back from the house, making a call to the rest of the police officers to come, when you came back from Officer Abbey's house, you saw all of these officers standing around at a certain spot; is that what you are trying to tell us?

A. They were present out in the yard, yes.

Q. Close together?

A. Well, I don't know how close.

Q. Well, close enough to touch each other; is that right? Isn't that what you were telling us?

A. They weren't in a huddle. I know that.

Q. They were standing close enough, were they, so they could touch each other?

A. No, I don't think so.

Q. You don't think so? A. No, sir.

Q. Close enough so that they could talk to each other? A. Yes, sir. [200]

Q. And where was Mr. Wells at that time?

(Testimony of Alfred A. Sousa.)

A. I don't remember the exact spot, sir.

Q. But he was around there?

A. He was present, yes.

Q. I thought you told us yesterday somebody had to call Mr. Wells from some place.

A. That's right.

Q. Where was Mr. Wells?

A. I don't remember.

Q. Are you sure someone had to call Mr. Wells, or are you just guessing?

A. No, I heard someone call Mr. Wells.

Q. Who called Mr. Wells?

A. I don't remember.

Q. Mr. Wells was not around that group, was he?

A. He was close by.

Q. Close by, outside of the group?

A. Yes.

Q. What was Mr. Wells doing?

A. That I don't know, sir.

Q. What were the words used when someone called Mr. Wells?

A. I don't remember, sir.

Q. How do you know someone called Mr. Wells?

A. I heard them call Mr. Wells. [201]

Q. What is that?

A. I heard them call Mr. Wells.

Q. What words did he use?

A. I don't know the words they used.

Q. You just know that someone called Mr. Wells?

A. That's right, sir.



(Testimony of Alfred A. Sousa.)

Q. Did you see Mr. Wells come up to the group?

A. Come up to where, sir?

Q. Come up to the group, join the group, after he was called.

A. Yes, Mr. Wells came by.

Q. Then what happened?

A. The capsules were pointed out to him.

Q. By whom?

A. I don't know who pointed them out.

Q. You don't know by whom?

A. No, sir.

Q. Then what happened? Then what happened next?

A. The capsules were picked up.

Q. By whom?

A. I don't remember, sir.

Q. You don't know by whom?

A. No, sir.

Q. Someone pointed out the capsules; you are talking about the six capsules? [202]

A. I am talking about the six capsules, yes, sir.

Q. And you saw the capsules on the ground, you are talking about?

A. Yes, sir.

Q. And you were all standing around, six of you, excepting Mr. Wells; five of you were standing around?

A. We were all standing around. I don't know whether there were six or four or nine or how many were standing around.

Q. Anyway, someone called Mr. Wells and he came to where you were standing around?

A. Yes, sir.

Q. And the defendant was there?

A. The defendant was there, yes, sir.

Q. You don't know whether they handcuffed



(Testimony of Alfred A. Sousa.)

him or not? You don't know whether he was handcuffed or not?

A. I don't remember. I don't think he was at that time, but I can't make a positive statement.

Q. And then someone called Mr. Wells, you don't know who, and Mr. Wells came, from where you don't know? A. That's right, sir.

Q. And someone picked it up; you are sure of that, but you don't know who picked it up?

A. That's right, sir.

Q. Did you see a blackjack in anyone's hand?

A. Officer Abbey's.

Q. What did you see him do with that blackjack?

A. I didn't see him do anything with it.

Q. Well, when was it that you first saw Abbey with a blackjack?

A. I know he had it when he was in his house.

Q. You mean before the raid? A. Sure.

Q. Well, was he saying he was going to do anything with that blackjack or not?

A. No, he didn't.

Q. Who else had a blackjack at the house?

A. I don't know, sir.

Q. Well, didn't you see Officer Abbey with his blackjack at the scene of the scuffling, the struggling, as you say?

A. Yes, he had his blackjack with him.

Q. I am asking you what he was doing with the blackjack, if you saw it.

(Testimony of Alfred A. Sousa.)

A. I said I don't know, sir.

Q. You don't know? A. No, sir.

Q. You never saw him use it? A. No, sir.

Q. Did you see any other officer with a black-jack? [204] A. No, sir.

Q. Or anything similar to that?

A. No, sir.

Q. You didn't have any blackjack?

A. No, sir.

Q. Officer Sousa, can you tell us today—yesterday you weren't so sure—can you tell us today—You were about eight feet behind Mr. Wells as he came up to the defendant's car; do you remember that? Six to eight feet behind Mr. Wells?

A. That's right.

Q. As he came up to the defendant's car?

A. That's right.

Q. You were the first one behind Mr. Wells, too; that right? A. Captain Whitford and myself.

Q. But Whitford went to the right of the car?

A. That's right, sir.

Q. So far as anyone being behind Mr. Wells as he went up to the defendant's front part of the car, you were the only one behind Wells at that time; is that right? A. I was behind Mr. Wells.

Q. I am asking you now to tell us today whether when Mr. Wells first went up to the front left door of the defendant, whether you saw the defendant's hand on the door or any part of the door, or not.

(Testimony of Alfred A. Sousa.)

A. No, I don't remember that, sir.

Q. You don't remember that?

A. No, sir.

Q. But the door was open? A. Yes, sir.

Q. When Mr. Wells first went up to the defendant, or as he was just about to reach the defendant's position in the front of his car, the door was closed, wasn't it? A. Partially opened.

Q. Before that, it was closed?

A. When he was driving in, the door was closed.

Q. When he was driving in, just as he came to a stop, the door was closed, wasn't it?

A. I don't recall it that closely, sir.

Q. You don't recall? A. No, sir.

Q. How far was Mr. Wells from the car door when the door was opened, if you know?

A. Will you repeat that again, sir?

Q. How far was Mr. Wells from the left door at the time the door opened?

A. Well, he was not too far away.

Q. Not too far away? A. No, sir.

Q. About one foot, two feet? [206]

A. I imagine maybe a couple of feet.

Q. You imagine maybe a couple of feet, and that is about the time the car came to a stop?

A. No, the car was stopped already.

Q. Stopped already? A. Yes.

Q. You were in a direct line behind Mr. Wells at that point?

A. I don't remember whether I was in a direct line, sir.

(Testimony of Alfred A. Sousa.)

Q. But in a position to see him; right?

A. Yes, I could see him pretty clear.

Q. And in a position to see the door; right? Of the car? A. Yes, sir.

Q. And you saw, the only part of the defendant's body that you were able to see at that time was part of his left hand as he pushed Mr. Wells, you indicated yesterday, like this (indicating)?

A. And his foot.

Q. And his foot. Were you one of those who searched the defendant's car?

A. Yes, I looked in the defendant's car.

Q. Who else helped you look into the defendant's car? A. I don't remember, sir.

Q. You don't remember? [207]

A. No, sir.

Q. Did you find anything in the defendant's car at any time?

A. I didn't find anything there, sir.

Mr. Miho: That is all.

The Court: Redirect.

### Redirect Examination

By Mr. Hoddick:

Q. When you stated, Mr. Sousa, that you saw the car, or the door of the defendant's car open, did you see it open from a closed position or was it already partly open when you first saw it?

A. It was partly——

Mr. Miho: If your Honor please, that is a very leading question.

(Testimony of Alfred A. Sousa.)

The Court: Sustained.

Q. (By Mr. Hoddick): Mr. Sousa, what was the original position of the door when you first noticed the door?

A. It was partly open when I first noticed it, sir.

Q. Was there any change in that position?

A. Yes, as the defendant came out. Next time when I noticed the door, it was widely open.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.) [208]

The Court: Next witness.

Mr. Hoddick: Mr. Pestano.

### HARRY L. PESTANO,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: Harry L. Pestano.

The Court: Your age?

The Witness: Twenty-six.

The Court: Your residence?

The Witness: 523 North School Street.

The Court: Honolulu?

The Witness: Yes, Honolulu.

The Court: Your occupation?

The Witness: Police officer, Honolulu Police Department.

(Testimony of Harry L. Pestano.)

The Court: And your citizenship?

The Witness: United States of America.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Pestano, how long have you been with the Honolulu Police Department? [209]

A. It is one year—it is two years January 19.

Q. What division of the Police Department are you assigned to?

A. Right now I am in the patrol division.

Q. And to what division were you assigned during July of this year?

A. I was in the vice division.

Q. How long did you serve in the vice division?

A. Fourteen months.

Q. Do you know the defendant, Orestus Cavness?

A. Yes.

Q. Would you point him out for the Court and jury, please?

A. He is sitting right there, right next to Mr. Miho.

The Court: Well——

Mr. Hoddick: May the record show he identified the defendant.

The Court: There are two people sitting next to Mr. Miho. Which one is he?

(Testimony of Harry L. Pestano.)

The Witness: The one at Mr. Miho's left.

Q. (By Mr. Hoddick): You mean on the far end of the table? A. Yes.

The Court: All right.

Q. (By Mr. Hoddick): Do you know where the defendant [210] lives?

A. Yes. 1138 Leahi Avenue.

Q. Excuse me. I don't know if I got that address correctly. Do you know what address it is?

A. Leahi Avenue; 1138, I believe.

Q. Do you know who lives opposite Mr. Cavness? A. Yes, Officer Abbey.

Q. Did you have occasion to go to Mr. Cavness' house or premises during the month of July, 1949?

A. Yes, on July 19.

Q. And where were you immediately before going to Cavness' house?

A. I was at the fire station on Kapahulu Avenue.

Q. And what were you doing there?

A. I was waiting for orders prior to a raid that was to be conducted at 1138 Leahi Avenue.

Q. That is at the defendant's premises?

A. Yes.

Q. And did you receive such instructions?

A. Yes, I did.

Q. And you went to the defendant's premises?

A. Yes, after being called by Sergeant Sousa.

Q. Approximately what time?

A. About 5:50 to about 5:55 p.m.



(Testimony of Harry L. Pestano.)

Q. And what did you see when you got there?

A. When I got there, Captain Whitford was in the front of the car, in the premises, 1138. Cavness was handcuffed. Officer Abbey, Officer Shaffer, and Sergeant Sousa, with myself and Officer Marcotte and Officer Ferry, when we got there the party that had been at the raid before we had was preparing to enter the house.

Q. And Cavness was with them as they were going into the house?      A. Yes.

Q. Do you remember what the condition of his hands was?

A. He was handcuffed in the back. Both hands were in the back of him, handcuffed.

Q. Did you see Mr. Wells when you got there?

A. Yes, he was there.

Q. Did you go into the house with them?

A. Yes, when we got there, Mr. Wells, Captain Whitford and the rest of the party prepared to go into the house, so we followed.

Q. And what took place after you all went into the house?

A. Nothing, to my knowledge. Just that I followed orders as to searching the house, the rooms.

Q. Did you see Mr. Wells serve a search warrant on Mr. Cavness in the house?

A. In the house, yes, I did.

Q. Did you see Mr. Wells at any time in the house [212] place the defendant under arrest?

A. Yes.

(Testimony of Harry L. Pestano.)

Q. Do you remember what the grounds for that arrest were?

A. For narcotics, as Mr. Wells put it. What I recollect was, the defendant Cavness was always on the move; he couldn't sit down one place, and Officer Marcotte——

Q. Just what the grounds were for placing Mr. Cavness under arrest in the house after you got in. You say possession of narcotics?

A. Yes, Mr. Wells told——

Mr. Miho: I object to that question. I think Counsel has had enough leeway. I don't like to interrupt, but he is putting the answers in question form to every witness.

The Court: Let's confine ourselves to what is before us presently. The question, as doctored, is leading. The objection, therefore, is sustained. The question, Mr. Witness, is: For what purpose, if you know, did Mr. Wells, in the house, arrest the defendant?

The Witness: Well, when I was in the room—I mean in the parlor there, I was told to watch Cavness with Officer Marcotte, and Cavness was always——

The Court: Wait a minute. Answer the question. For what cause, if you know, did Mr. Wells, in the house, [213] arrest the defendant?

The Witness: Mr. Wells told Cavness he was placed under arrest for narcotics.

Q. (By Mr. Hoddick): Now, Mr. Pestano,

(Testimony of Harry L. Pestano.)

when the officers—You participated in a search of the house?      A. Yes, I did.

Q. And did you see anything that had been found by any of the other officers?

A. No, I did not.

Q. Prior to the time that you got there?

A. No.

Q. You didn't see anything that any of the other officers found?

A. No, I did not. I didn't see them when they found them, but after everything was laid on the table, I saw it, in the vice room.

Q. You didn't see it until you got to the vice room?      A. Yes.

Q. In your search did you find anything?

A. Yes.

Q. And, if so, where?

A. Yes, I did, in the——

Mr. Miho: If your Honor please, I think that is objectionable in the light of your Honor's ruling during motion for suppression of evidence. The motion was denied, but [214] evidence as to suppression was restricted as to the things they were permitted to search and not to other objects.

The Court: Your general statement as to my ruling is substantially correct. Now the question is what?

Mr. Hoddick: The question now is whether this officer found anything in his search of the premises, and if so, what.

(Testimony of Harry L. Pestano.)

Q. (By Mr. Hoddick): Answer the first question first. Did you find anything in your search of the premises? A. Yes.

Mr. Miho: Just a moment, if your Honor please.

The Court: Wait a minute. We have got to start somewhere. Simply did he find anything, "yes" or "no."

Mr. Miho: But I believe under your Honor's ruling that he is restricted, and therefore if Counsel is offering through this witness, to try to introduce those matters that have been specifically restricted, it will be improper, is my point. I don't like to have the thing presented and have the Court instruct the jury to disregard it. It will be unfair.

The Court: I am sure Mr. Hoddick is aware of the Court's ruling. If he wilfully violates it, he will hear from me.

Mr. Hoddick: May it please the Court, it was my understanding that you ruled pursuant to the search warrant only the drug itself would be introduced in evidence, that [215] pursuant to the lawful arrest in the yard those items found in the yard closely connected with the scene of the arrest could be introduced into evidence, and, third, that it was suggested by myself that pursuant to a further arrest in the house that items found in the house might be introduced in evidence; and I understood that question was left open until we would reach it at this time.

Mr. Miho: That is not your Honor's ruling, if

(Testimony of Harry L. Pestano.)

your Honor please. The record speaks for itself.

The Court: I know what I ruled, and I am not going to review it now in the presence of the jury. But I don't know so far what this man was doing, whether he was functioning under the search warrant under Mr. Wells' direction or whether he was functioning under some other basis. All you have asked him is, Did he participate in the search and find something. Let's get a foundation here and find out what he was doing. I am going to sustain the objection simply to make Mr. Hoddick start all over again and get a fresh start on this.

Q. (By Mr. Hoddick): After you arrived at the premises, did you receive any further instructions?      A. I did, yes.

Q. And what did you do as a result of those instructions?

A. I started looking for evidence concerning the case. [216]

Q. And who gave those instructions to you?

A. Captain Whitford.

Q. Now was this before or after Mr. Wells placed the defendant under arrest for the possession of narcotics in the house?      A. After.

Q. After?      A. Yes.

Q. Now, my question is, In the course of your search, did you find anything?

A. Yes, I did, an empty Vicks inhaler tube.

Mr. Miho: Just a moment. If Your Honor please, the foundation is still improper and the original ruling of the Court still holds, if your

(Testimony of Harry L. Pestano.)

Honor please. This is the first time I have seen a case in which the witness is permitted to state what some other witness present in court stated to him. That is the first time anything came up for arresting the defendant in the house for possession of narcotics. It has been admitted that he is no expert on narcotics.

The Court: Who?

Mr. Miho: Mr. Wells. This witness is trying to say Mr. Wells arrested the defendant for possession of narcotics in the house, if your Honor please.

The Court: I don't think you are following what is [217] being said. I didn't understand the witness to mean, when he said that, that the man arrested actually had narcotics then in his possession.

Mr. Miho: That is what Mr. Hoddick's question is, and his answer that Mr. Wells arrested the defendant in the house for the possession of narcotics.

The Court: Yes.

Mr. Hoddick: That is correct.

The Court: But I don't think it has the meaning that you attribute to it. I am going to excuse the jury and we will get this straightened out. Step outside again, please.

(Jury exit.)

The Court: The jury is now outside.

(Discussion of Court and Counsel.)

(Recess had.)



(Testimony of Harry L. Pestano.)

The Court: Note the presence of the jury and of the defendant.

Mr. Miho: Ready for the defendant, your Honor.

The Court: Ready to proceed?

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Officer Pestano, how many of you came to the scene from the fire station, if you recall? [218]

A. Three of us.

Q. Who?

A. Officer Marcotte, and Officer Ferry.

Q. Where was Officer Roberts?

A. Officer Roberts came by himself, I believe. After we came, Officer Roberts arrived.

Q. All three of you, Marcotte, Ferry and yourself—By the way, your name is spelled (spelling) P-e-s-t-a-n-o? Or (spelling) P-e-s-t-a-n-a?

A. (Spelling) P-e-s-t-a-n-o.

Q. (Spelling) N-o? A. Yes.

Q. The three arrived at the defendant's house in the same car? A. Yes, sir.

Q. And when you arrived, how many officers were proceeding into the house? All six? Or, May I ask you this question; it may be simpler. Were all the other officers, other than you three, were they all going into the house of the defendant? And Wells? A. Yes, sir.



(Testimony of Harry L. Pestano.)

Q. Now did they all go into the house, actually go into the house? Do you recall that?

A. I did. As to actually, they did.

Q. Did you follow them in? [219]

A. I went in about third or fourth person.

Q. But do you remember clearly that they all came into the living room at that time; is that right?

A. I couldn't say if all of them came in, but most of the officers that participated were in the living room.

Q. Do you recall specifically if Officer Abbey and Officer Shaffer, Sergeant Shaffer, were in the parlor that first times? A. Yes.

Q. They were? A. Yes.

Q. And you actually saw them; is that right?

A. Yes.

Q. That is why you know? A. Yes, sir.

Q. At that time, Mr. Pestano, so far as you can now recall, no one had found anything in the yard, is that right, at that time, when you first went into the house? A. Yes.

Q. And then after you had gone into the house with all the other officers, then someone went out, isn't that right, Officer Abbey and Officer Shaffer went out of the house? A. I couldn't say.

Q. But someone yelled from the outside that something was found; isn't that right? [220]

A. I couldn't say for anybody else because I didn't hear it.

(Testimony of Harry L. Pestano.)

Q. Do you recall anybody saying something was in the yard?      A. No.

Q. You don't recall that?      A. No, sir.

Q. Well, do you recall whether he went out into the yard later on to look for the key to the car?

A. No, sir.

Q. You don't recall that?

A. No, sir. I went out myself.

Q. You went out yourself?

A. In the back, facing the dog.

Q. A little German police dog, puppy?

A. I couldn't recall if it was a German police.

Q. It was a small dog, though?

A. It was not a small dog. It was quite big.

Q. Was it a dog or puppy? Don't you know the difference between a puppy and a grown dog?

A. No, I don't. It could have been still a puppy. I really don't know if it is a puppy.

Q. It wasn't a vicious dog, snapping at you, or anything like that, was it?      A. No.

Q. Do you recall seeing where the defendant was [221] bleeding at any part of his face or head or not?      A. Yes.

Q. And, Pestano, tell us where he was bleeding.

A. Well, he was bleeding on his lip and his head.

Q. The back of his head?

A. On top of it. It was dripping down on the back.

Q. Did you notice whether the skull was open or not?      A. No, I didn't.

Q. Did you notice how long the cut was, or not?

(Testimony of Harry L. Pestano.)

A. No, I didn't.

Q. Do you remember his right eye, whether it was bruised or not?

A. I didn't notice. I just noticed that he was bleeding.

Q. What about his cheeks, right cheek?

A. No, I didn't notice.

Q. Of course, he is very dark; you may not have seen that. Do you know if any officers later on went to search for the car keys or not?

A. No, sir, I don't know.

The Court: Speak louder, please.

Q. (By Mr. Miho): Do you know who drove the defendant's car away from his yard?

A. Yes, sir, I did.

Q. You did? [222]                      A. Yes, sir.

Q. Who gave you the key to the car?

A. Mr. Wells.

Q. This man here who sits on the left of Mr. Hoddick?                      A. Yes, sir.

Q. With his hand over his mouth?

A. Yes, sir.

Q. Do you know where Mr. Wells got the key to the car?                      A. No, sir.

Q. You don't?                      A. No, sir.

Q. He told you to take the car down to the police station?                      A. Yes, sir.

Q. That was the defendant's car, the Hudson car in the driveway?

A. It was a Hudson car. I really don't know if it is his own car or not.

(Testimony of Harry L. Pestano.)

Q. And that was after everything was all over; isn't that right? A. Yes, sir.

Q. And that was after defendant had already been taken some place by some other officers? When you drove the car away, defendant was not present; is that right? [223]

A. He was present up until the time I started the car, because we all left at the same time.

Q. He was present up until that time?

A. Yes.

Q. And when you first came up there to join the other boys going into the house, defendant was handcuffed on his back like this (indicating) as I am demonstrating; is that right? A. Yes, sir.

Q. And was the defendant later on released from his handcuffs in the house? A. Yes.

Q. And then he was permitted to wash himself; is that right?

A. Yes. I followed him to the bathroom; and Officer Marcotte.

Q. Up to that time no one mentioned anything about finding anything; isn't that right? Up to that time?

A. To the time prior to going into the lavatory?

Q. No. I will reframe that. Up to the time the defendant was released from his handcuffs to go in and wash himself, up to that point—this is in the house. A. Yes.

Q. Up to that time no one had found anything, so far as you know? [224]

(Testimony of Harry L. Pestano.)

A. Well, I was told that something had been found.

Q. At that point?           A. Yes, before.

Q. He was released?

A. Before he went to the lavatory, he was released already.

Q. Had the defendant gone out of the house?

A. He was out when I came there, but after that I didn't.

Q. After he was brought into the house and you proceeded with him, about the fourth man behind the defendant, after he came into the house that time, he was never out of the house; isn't that right?

A. I really don't know because I was searching the rooms.

Q. Did I misunderstand you? Weren't you told to watch the defendant with someone else?

A. Yes, with Marcotte. After that I was told——

Q. To stay with the defendant?

A. No, Officer Marcotte was told that. I was told to accompany the rest of the officers in searching the rooms.

Q. Before you went up to the defendant's house—let's go back to the vice squad. I presume you all had a meeting at the vice squad, Captain Whitford's office or some place in the police station.

A. Yes.

Q. And all nine or ten of you were present with Mr. Wells, is that right, at that time?

(Testimony of Harry L. Pestano.)

A. No, we had instructions, we were on the road at the time, and we were supposed to be at a certain point. At the time the plan was made prior to the arrest of the defendant we didn't know anything.

Q. Well, the instructions came by telephone?

A. Radio.

Q. Radio. And what was said in that instruction?

A. We were to be at a certain point at a certain time.

Q. To raid his place?

A. No. We didn't know whose place we were to raid. We were supposed to be at that certain point and wait for further instructions.

Q. A while ago you said you were waiting to raid the defendant's home. Didn't I understand you to say you were waiting to raid the defendant's home? Didn't you say that to Mr. Hoddick?

A. Yes, I did.

Q. And now you are saying——

A. Prior to that we didn't know anything.

Q. When did the idea of a raid come into your mind?

A. Well, it come natural after how many raids we have been at. When we were sent to a certain point, we knew there [226] was something coming up. I knew there was going to be a raid. As to where it was, we didn't know.

Q. But you knew you were going to raid someone's place; isn't that right?      A. Yes.



(Testimony of Harry L. Pestano.)

Q. And the idea of going to search someone's place never entered into your mind; isn't that right? A. Not at that time.

Q. The only idea you had in mind was that you were going on a raid some place; isn't that right?

A. Yes.

Q. Mr. Pestano, you and the other officers searched for some time after the defendant was brought into the house, handcuffed and brought into the house; isn't that right? A. Yes.

Q. It took a long time; approximately two hours; is that right? A. Yes, about that.

Q. When you first went up there, it was still light, wasn't it? A. Yes, sir.

Q. But when you left the place, it was just after darkness; isn't that right?

A. Just beginning to——

The Court: Speak up. [227]

The Witness: Just beginning to come dark.

Q. (By Mr. Miho): Did you see someone with a blackjack in his hand at any time?

A. No, I did not.

Q. Did you ask anyone how the defendant received his injuries at any time?

A. No, I did not.

Q. Do you remember anyone saying how the defendant received his injuries? A. Yes.

Q. What did they say, or who said what?

A. I was told that he was hit on the hand with a blackjack. As to how he had a cut on the head,



(Testimony of Harry L. Pestano.)

I was told that he fell next to the car and bumped his head.

Q. Bumped his head on the car. Do you remember who said that to you or to someone else?

A. Yes, the officers did.

Q. Officer Shaffer, wasn't it?

A. Well, not particular; Sergeant Sousa.

Q. Sousa said that, too? A. Yes.

Q. Did Abbey say that, too? A. Abbey?

Q. Yes, Abbey. A. Yes. [228]

Q. He said that, too. In other words, they all said in your hearing, in your presence, that the defendant received his cut because he fell on the car bumper?

A. That is one of the reasons how he got it, if he had it from the car bumper. They didn't say he had it directly from the car bumper.

Q. Did anyone say how he received the injuries on his face? A. No.

Q. You didn't hear that? A. No.

Q. You didn't inquire either?

A. No, sir, I didn't see any, I didn't notice any.

Q. Of course, you never took part in any of the subduing? A. No, sir.

Q. That was all over? A. Yes, sir.

Q. Do you remember seeing blood on the ground, Officer Pestano? A. No, I did not.

Q. You did not? A. No.

Q. You saw the defendant's shirt was bloody?

A. Yes, I did. [229]

(Testimony of Harry L. Pestano.)

Q. Especially in the front; isn't that right?

A. I don't recall it was in the front, but I know he was bleeding from the back.

Q. And do you remember seeing Officer Paul Shaffer's shirt that he had on full of blood in the front?

A. No, I didn't notice.

Q. You didn't notice that?

A. No, sir.

Q. Did you notice any other officers with blood on their shirt or hand?

A. I didn't notice. I was right next to the defendant.

Q. You went back to the vice squad; were you present when Agent Wells came into the vice squad, captain's office?

A. Yes, when I handed him the empty Vicks inhaler tube.

Q. Do you remember if Captain Whitford handed anything over to him?

A. No, I don't.

Q. You were present, though?

A. Well, as officers, we don't mingle.

Q. You don't mingle?

A. Captain's office is captain's office, and we are out unless called in.

Q. Your regulation is: Captain's office is more or less, sort of a safe, forbidden place? [230]

A. That's right.

Q. And you officers, except the Captain himself, unless you have permission, you don't go in there?

(Testimony of Harry L. Pestano.)

A. Yes.

Q. So in the Captain's office, so far as you know, there were only Captain Whitford and Agent Wells? A. Some of the boys were in.

Q. Who?

A. Officer Shaffer and Sergeant Sousa, they were called in. When I got there I was called in. Also the rest of the officers were in there.

Q. You were called in one by one?

A. Yes, sir.

Q. You didn't all go in there from the beginning?

A. No, we did not. I was outside I know, but as to who was in the room at the time before that, I don't know.

Q. But what probably happened, from your recollection, is this, isn't it: that Captain Whitford and Mr. Wells went into the Captain's room first?

A. Yes, sir.

Q. And Captain Whitford would call certain officers and they would go in?

Mr. Hoddick: I object. There is no foundation laid to show this defendant would know what took place.

The Court: Sustained. [231]

Mr. Hoddick: Furthermore, any questions dealing with the vice squad I will object to on the grounds it is improper cross-examination. He was not queried about anything after this raid on direct examination.

(Testimony of Harry L. Pestano.)

The Court: Overruled on that ground, but the first ground is sustained. We are not interested in what probably happened, but what happened, if he knows.

Q. (By Mr. Miho): Isn't that what happened? Captain Whitford and Mr. Wells went into the Captain's room first and Captain Whitford would call some other officer into his room, one by one; isn't that what actually happened?

A. Yes. Sergeant Sousa was already there.

Q. Sousa was also there with Whitford and Wells first? A. Yes, I believe he was.

Q. And then the others would be called in?

A. Yes.

Q. Did you ever run into, in your fourteen months there, any woman by the name of Jerry Wilson?

Mr. Hoddick: Objection.

The Court: Sustained.

Mr. Miho: No further questions.

The Court: Redirect Examination.

Mr. Miho: Save an exception.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.) [232]

The Court: Call the next witness.

Mr. Hoddick: May it please the Court, at this time the Government would like to rest its case.

The Court: Very well.

Mr. Ahrens: At this time, your Honor, defense moves for a judgment of acquittal on the ground the Government has failed to introduce evidence sufficient to sustain a conviction, first, in that the Government has failed to prove knowledge on the part of the defendant that the cocaine was not in or from the original stamped package; secondly, that the Government has failed to prove directly the absence of appropriate tax stamps; and, thirdly, if they have proved the absence of those stamps, that they have failed to prove that the cocaine was not from an original stamped container.

The Court: Very well, do you wish to be heard in argument upon that motion?

Mr. Ahrens: Yes, your Honor.

The Court: All right, but not now. Do you resist the motion?

Mr. Hoddick: Yes, your Honor.

The Court: All right, I will excuse the jury until 2 o'clock this afternoon.

Mr. Miho: Perhaps, if your Honor please, an inspection of the premises could be arranged about 1:30 to save time. [233]

The Court: I have a matter at 1:30 I have to attend to. How far away is this place where you want us to take a view?

Mr. Miho: Not far. I think it is about a ten- or fifteen-minute drive, as I recall. The jury could go by themselves while we argued—I mean, accompanied by the Marshal.

The Court: I appreciate your liberality, but I think the best thing is to have the jury report at 2

and have the Marshal make arrangements to have transportation available, and at your request we will go out and take a view of the premises. It may develop by 2 o'clock there may be no need of going. But let's have the jury report at 2 and we will go on from there.

So at this time, Gentlemen of the Jury, I will excuse you until 2 o'clock, and in the meantime I will retain Counsel and hear them upon the motion. At 2 o'clock we will find out where we go from there.

(Exit jury.)

The Court: The jury is now out of the court room.

(Argument by Counsel.)

(Thereupon, a recess was taken at 12.00 noon until 2 p.m. of the same day.) [234]

#### Afternoon Session

2:00 p.m.

The Court: Gentlemen, the attorneys are out at the place where we are going to take a view, so we will adjourn to it for the purpose of taking a view. But before we do, I want to remind you that this is a view only; it is not evidence. We are simply going to go and see the premises that have been described in the evidence so you can better understand the evidence. There will be no talking except as the attorneys ask me to call your attention to certain physical objects, so you just listen and observe what may be pointed out to you, but do not



discuss the case with anyone. So we will all go out through the door and go into the bus.

(View of the premises taken.)

The Court: Note the presence of the jury and of the defendant and let the record show that between the hours of two and three this afternoon we have been on a view of the premises, in accordance with the request of the defendant. Having returned therefrom, with respect to the pending motion, before I rule, is there something you want to say, Mr. Ahrens?

Mr. Ahrens: Did you want further argument on the motion or did you wish to rule out of the presence of the jury or in their presence?

The Court: I think I will not need any further argument. The motion is denied. You may have an exception.

Mr. Ahrens: We note an exception for the record. [235]

The Court: Mr. Miho, will you come here just a moment, please.

Mr. Miho: Yes, sir.

(Confer.)

The Court: Very well, the Government having rested, does the defense at this time wish to make an opening statement?

Mr. Miho: No, if your Honor please. I would like to reserve that until the case is over.

The Court: You can't reserve an opening statement any longer. You mean whatever you have to



say you will incorporate in your final argument, I take it is what you mean.

Mr. Miho: Yes, in my final argument.

The Court: So that at this time you may call your first witness.

Mr. Miho: Mr. Cavness, will you take the stand.'

### ORESTUS CAVNESS

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Before we proceed, I again wish to remind the jury that the view of the premises in question which we took was not evidence but simply a view taken to better enable you gentlemen to understand the evidence which has been and will be adduced here upon the trial. [236]

All right, Mr. Witness, your name is?

The Witness: Orestus Cavness.

The Court: And your age is?

The Witness: Twenty-five.

The Court: And your residence is Honolulu?

The Witness: Yes.

The Court: And your occupation is that of?

The Witness: Barber.

The Court: And you are a citizen of the United States?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: Take the witness.

(Testimony of Orestus Cavness.)

Direct Examination

By Mr. Miho:

Q. Where were you born, Orestus?

A. When?

Q. Where? A. Texas.

Q. And are your parents still living?

A. My mother is still living.

Q. She is on the Mainland? A. Yes.

Q. Is she dependent upon you in any way?

A. Partially.

Q. Do you have a father living?

A. My father is deceased.

Q. When you were how old? A. Eight.

Q. Did you go to school?

A. High school; elementary and high school.

Mr. Miho: Speak loud enough and clear enough so that you can be heard.

The Witness: Three and a half years in high school.

Q. (By Mr. Miho): Two and a half years?

A. Three and a half.

Q. Three and a half years in high school?

A. Yes.

Q. When was it that you got through with your school? A. '43, first of '43.

Q. And after you got through with your school, what did you do next?

A. I started working for defense.

Q. Started working what?

A. Defense.

(Testimony of Orestus Cavness.)

Q. Defense work? A. Yes.

Q. Where did you first work as a defense worker? A. Galveston. [238]

Q. How old were you then?

A. Seventeen, I think.

Q. And where did you work after Galveston?

A. Beg pardon?

Q. Where did you work after Galveston?

A. Dayton, Ohio.

Q. Still in defense work? A. Yes.

Q. And from Dayton where did you go?

A. Los Angeles.

Q. What did you do in Los Angeles?

A. I started working in defense.

Q. And then what?

A. Then in the meantime I was working in defense, I was working swing shift, so I was going to barber school part time.

Q. Will you speak clear enough——

A. I said I was going to barber school during the time I was working in defense, in the morning. See, I was working swing shift and so after a period of about a year I finished barber college and obtained a license to practice as a barber in the state of California. So the latter part of '44, I think it was, I started practicing as a barber.

Q. And are you still a licensed barber in the state of California? [239] A. Yes.

Q. And how long were you a barber in California? A. About three and a half years.

Q. Three and a half years? A. Yes.

(Testimony of Orestus Cavness.)

Q. In other words, you went to barber college during the same time you were working swing shift in the defense plant? A. Yes.

Q. And after your three and a half years as a barber in California, where did you go?

A. Came to Honolulu.

Q. Came to Honolulu? A. Yes.

Q. And when did you come to Honolulu?

A. In '47.

Q. When you came to Honolulu, you established a barber shop in Honolulu, I understand.

A. Yes.

Q. And you still operate a barber shop?

A. Yes.

Q. And how many people are with you, working for you in this barber shop?

A. Two besides myself.

Q. And the barber shop is your only source of income? [240] A. Yes.

Q. Are you a licensed barber in the Territory of Hawaii? A. Yes, I am.

Q. Are you a member—By the way, are you married or single? A. Single.

Q. Ever been married? A. No.

Q. You say this barber shop is still operated; is that correct? A. Yes.

Q. And are you a member of any fraternal organization or organizations? A. Elks.

Q. What? A. Elks.

Q. What do you mean? A. Elks.

(Testimony of Orestus Cavness.)

Q. Oh, the Elks? A. Yes.

Q. Locally? A. Yes.

Q. Are you a member in good standing of the Elks organization? A. Yes, I am. [242]

Q. Any other organizations?

A. Not as I can remember right now.

Q. You know who Mr. Wells is, do you not?

A. Yes.

Q. He is the man who is sitting at this trial on the left of Mr. Hoddick, the Government prosecutor? A. Yes.

Q. You had some pilikia with him July 19 of this year, is that correct? A. Yes.

Q. Now, prior to that date——

Mr. Miho: Withdraw the question.

Q. (By Mr. Miho): On the day in question when you saw Mr. Wells, that is, July 19, did you recognize him as Mr. Wells? A. No.

Q. Subsequent to that raid on July 19, do you recall whether you had seen Mr. Wells before in your life or not? A. On one occasion I had.

Q. And what was that occasion?

A. We were having a birthday party with a resident of Waikiki, and since that time—I mean, he was identified to me as the same person that I saw out there.

Q. Something happened at that birthday party; is that [242] right? A. Yes.

Q. Whom were you supposed to meet at the birthday party?

(Testimony of Orestus Cavness.)

A. Joe Louis was passing through, so a friend of mine informed me that we was supposed to be present, so we decided to go out there, and it was a birthday party.

Q. And that party was raided; is that right?

A. Yes.

Q. And someone told you later on that Wells was in that raiding party; is that right?

A. They pointed him out, yes, afterward.

Q. But on July 19 when you saw Mr. Wells, did you know who he was?

A. No, because that night when I saw him at this party, he was wearing a hat, and seeing a person twice it is kind of hard, I mean it would make a big difference with a man wearing a hat.

Q. How did Mr. Wells look to you on July 19?

A. He appeared to be drunk, under the influence of alcohol.

Q. You have seen drunken people before in your life?

A. Yes.

Q. Now you drove up in your car, the Hudson car?

A. Yes. [243]

Q. On that day about 5:30 or thereabouts; is that right?

A. Yes.

Q. How soon after you stopped your car did you happen to see Mr. Wells?

A. Immediately.

Q. Immediately after you stopped your car?

A. Yes.

Q. Do you remember what you did just about that time?

(Testimony of Orestus Cavness.)

A. Well, I was turning the switch off and getting out of the car and opening the door at the same time.

Q. And that is when you saw Mr. Wells?

A. Yes, when I looked around, he had his head in the window.

Q. Take your time and tell us in detail what happened at that time.

A. So when I turned my head to get out of the car, I looked and he had his head in the window of the car.

Q. What happened next.

A. As I proceeded to get out, he grabbed my left arm.

Q. Do you know whether you had anything in your right hand at that time or not?

A. I am not sure. I could have had my car key because that is what I was doing, pulling the key out of the switch when he approached. [244]

Q. Do you know whether, after the whole struggle and everything was over, whether anyone asked you for the car key or not? A. Yes.

Q. Who asked you for the car key?

A. Mr. Wells. Mr. Wells asked for the car key.

Q. Did you have the car key on your person?

A. No, I didn't.

Q. Do you know whether they found the car key at any place later on?

A. They went outside and searched for the car



(Testimony of Orestus Cavness.)

key and eventually they drove it off, so I gather they did find it someplace.

Mr. Hoddick: I move that that be stricken unless it be shown the witness saw them find the car key outside. He says eventually they found it.

Mr. Miho: I don't mind that it be stricken.

The Court: It may go out.

Q. (By Mr. Miho:) Anyway, you didn't have the car key on your person when they asked you for it? A. No.

Q. But you were present when the car was driven out of the yard by someone else? Were you present? A. No, I was not.

Q. When you came back from the police station, was your Hudson car home?

A. Gone.

Q. Now, did you at that time, or at any later time, push or hit Mr. Wells? A. No.

Q. Do you know whether the door touched Mr. Wells or hit him as you tried to get out of the car or not? A. That I couldn't say.

Q. Did you get out of the car?

A. Yes, I did.

Q. And you say that is when Mr. Wells grabbed your left hand or arm?

A. Yes.

Q. Tell us what happened next.

A. Then as I stood up, why someone grabbed me from the other side, right arm.

Q. Grabbed what? A. My arm.

(Testimony of Orestus Cavness.)

Q. Then what happened?

A. A few seconds somebody called me a name.

Q. What kind of a name?

A. Called me "black son-of-a-bitch." Then a few seconds after that I fell down, something hit me from behind, I fell down, and I don't remember exactly what happened after that.

Q. What kind of a blow was it that you felt on the back of your head?

A. It felt like a blackjack blow, something similar, something hard.

Q. Did you lose consciousness?

A. Yes, I did.

Q. And everything that happened later on was a hazy blank to you? In other words, did you remember everything else that happened after that?

A. No, I can't, not distinctly.

Q. What was the most—What is it that you remember most clearly after being hit, the next thing after being hit?

A. Most clearly I remember the fact that we were going into the house.

Q. And that you had been handcuffed already?

A. Yes.

Q. And who took you into the house, if you remember?

A. Mr. Wells and two or three other officers. I don't remember exactly.

Q. What happened when you got into the house?

A. He told me to sit down and get myself to-

(Testimony of Orestus Cavness.)

gether. Mr. Wells. And then he suggested to Mr. Marcotte or one of the officers to release the handcuffs so I could clean myself up. And after I cleaned myself up, he told me to relax so he could serve a search warrant, so they could proceed on their duties. So when the officer served a search warrant, I mean I was hazy or something, so I told them, I refused to read it; I guess I didn't feel like reading it at the time. I told him "never mind." He asked me whether I cared to read it. I told him "no."

Q. He asked you whether you cared to read it and you told him "no"?

A. Yes. So then I went back into the bathroom again and they gave me a first aid treatment.

Q. Do you remember who went with you to the bathroom?      A. Marcotte and Harry.

Q. Who?

A. Harry, the last guy that testified, I forget his last name.

The Court: Pestano?

The Witness: Pestano.

Q. (By Mr. Miho:) Was Shaffer with you, too?

A. He was in there, wasn't with me, but he was in the bathroom at the time.

Q. Did anyone say anything to you in the bathroom?

A. Shaffer made a remark that I must have fallen on the bumper of the car.

(Testimony of Orestus Cavness.)

Q. Must have fallen on the bumper of the car?

A. Yes.

Q. And received your injuries on the back of the head? A. Yes. [248]

Q. And did Shaffer go with you, and Marcotte, to the emergency hospital? A. Yes.

Q. And did Shaffer say anything on the way down to the emergency hospital?

A. No, I don't remember him saying anything.

Q. Now, after you were handcuffed and taken into the house, were you ever taken out of the house again? A. No.

Q. Were you ever taken out of the house when any officer saw something on the ground, or picked up anything on the ground? A. No.

Q. Were you ever confronted with anything that any officer found on the ground, or any place?

A. No, I was not. They asked me questions after I got to the vice squad, but I never seen any.

Q. They asked you questions at the vice squad, but you never saw anything?

A. I never saw anything.

Q. Did you see anything in Agent Wells' left hand when he first came to you?

A. In the yard?

Q. Yes.

A. I saw something in there. [240]

Q. Could you tell what it was he had in his left hand?

A. I couldn't identify what it was.

Q. Could you see his right hand at all?

(Testimony of Orestus Cavness.)

A. No, I couldn't.

Q. Did Wells ever say anything to you as to who he was or what he was there for, or anything like that, at that time?

A. Not at that time.

Q. He told you later in the house?

A. Yes.

Q. All that which you described which occurred soon after you stopped your car happened in how much of an interval of time?

A. I don't know the exact amount of time.

Q. Did it happen immediately, more or less altogether at one time, or at a long interval of time?

A. Happened immediately.

Q. Immediately. Now, did you have occasion to look at yourself in the mirror, or anything, after you went into the house?

A. In the bathroom.

Q. Bathroom? A. Yes.

Q. And did you see any injuries on your face?

A. Several injuries.

Q. Will you describe them to us. [250]

A. My lip was swollen and cut on the inside and outside, a bruise here (indicating), a bruise here (indicating), and my head behind.

Q. What was wrong with your head?

A. At the hospital they said the scalp was split-ten.

Q. And what did the doctor at the emergency hospital do to that scalp wound?

(Testimony of Orestus Cavness.)

A. Put two clamps in and shaved the hair around it.

Q. Were you able to eat—Before that had you had any injuries like that on your face and eyes, your cheek or your lips or your head, before you met Mr. Wells that day? A. No, I hadn't.

Q. Were you able to eat normally after this injury you received on your lips? A. No.

Q. How long did that continue, approximately?

A. About eight or ten days.

Q. You had difficulty in talking also; isn't that right? A. Yes.

Q. You didn't see anyone use a blackjack on you, yourself; is that right?

A. I don't remember seeing anyone. It was from behind and I didn't see it. I went face down.

Q. Have you ever been convicted of any kind of a felony [251] in your life up to now?

Mr. Hoddick: One second before you answer that, Mr. Cavness. I would like it understood as to whether Mr. Miho is endeavoring to put the witness' good character in issue or not. It seems to me that question is directed to that point.

The Court: You are asking him a question, not me.

Mr. Hoddick: I object to the question unless it is stipulated that defense Counsel is putting the witness' good character in issue.

The Court: You can exact no condition to his questions. Overruled. Do you wish to ask the question?



(Testimony of Orestus Cavness.)

Mr. Miho: Yes.

The Court: Read the question.

(Question read.)

Q. Answer the question.

A. No, I haven't.

Q. Do you know if you had anything in your left or right hand at any time at the raid?

A. I know I didn't have anything in my left hand at the time I was getting out of the car, but as I said before, I could have had the car key in my right hand, but I am positive I didn't have anything in my left hand.

Q. Did you have anything like the Vicks inhaler that they are talking about here in your left hand or right hand [252] that day?

A. No, I didn't.

Q. You said you are not sure whether you had a car key in your right hand or not?

A. I am not sure.

Q. Now, when you got out of your car, when Mr. Wells came up, did he open the door of that car or did you open the door to that car?

A. Well, I had cracked the door handle the same time I was turning the switch off myself.

Q. You opened the door yourself?

A. Yes.

Q. Mr. Wells didn't open the door, or any of the police officers; is that right?           A. No.

(Testimony of Orestus Cavness.)

Q. Can you tell us whether the door, any part of the door, touched Mr. Wells or not?

A. That I am not sure.

Q. Did you see Mr. Wells at any time stagger behind or lose his balance?      A. No.

Q. Did you hit anyone that day, Orestus?

A. No, I didn't.

Q. Do you remember how long it was that the officers searched your house and the yard, as you stated, after this [253] scuffle was all over?

A. They must have searched for about an hour and a half at least.

Q. At least an hour and a half?      A. Yes.

Q. And then after they got through with their search, you were taken to the emergency hospital?

A. Yes.

Mr. Miho: Your witness, Mr. Hoddick.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Hoddick:

Q. Where is your barber shop in Honolulu located, Mr. Cavness?      A. 1164 Smith Street.

Q. And who are the two other barbers who work for you there?      A. William Purify.

Q. And who else?

A. Willie James Calvin.

Q. And you cut hair there yourself?

A. Yes, I do.

Q. About how much time a day do you spend down there working?

(Testimony of Orestus Cavness.)

A. Three or four hours, according to the business. [254] I usually work at night most of the time.

Q. You mean after supper?

A. At night after maybe six o'clock.

Q. And the income from that barber shop is your only source of income? A. Yes.

Q. Approximately what is your gross income during the year from the barber shop?

Mr. Miho: Just a moment, if your Honor please. I venture to say that is completely immaterial, incompetent, and irrelevant. I don't see the materiality of how much he makes, whether a thousand or two thousand dollars a month.

Mr. Hoddick: The defense counsel opened up the subject of the barber shop and the fact that it was his only source of income. I would like to probe into that with reference to establishing the credibility or discredibility of the witness.

The Court: For what purpose?

Mr. Hoddick: The Government has — I think probably I should make whatever offer I am going to make out of the hearing of the jury, your Honor, out of fairness to the defendant.

Mr. Miho: He can rebut any testimony he wants to later on, if your Honor please, if it comes within the exception to collateral issue. [255]

The Court: This is cross-examination. You did open up the barber shop proposition. I will allow him to inquire into it, but I don't quite see what he is driving at at this moment.

(Testimony of Orestus Cavness.)

Mr. Miho: As to how much he makes, if your Honor please——

The Court: Unless it is in some way tied into this case it is irrelevant.

Mr. Hoddick: Your Honor——

The Court: You may proceed if you can connect it up. Otherwise, I will stop you.

Mr. Miho: Save an exception at this time.

The Court: Yes.

Q. (By Mr. Hoddick): Now you have to file— You file tax returns from the income earned from that barber shop? A. Yes.

Q. And how often do you file your returns with the Territory?

A. Supposed to file every quarter.

Q. Every quarter. Do you remember during the first two quarters of 1949 how much money you earned or how much gross income your barber shop earned?

Mr. Miho: Just a moment. It is still the same question stated in a different way, if your Honor please. As to his gross income, it is a matter of another criminal [256] procedure, if that is what he is trying to lay a foundation for. He is not being tried for any income tax evasion here.

The Court: That is correct. Gentlemen of the Jury, will you step out until I find out what this is all about.

(Exit jury.)

(Testimony of Orestus Cavness.)

The Court: The jury is now out of the court room.

(Discussion by Court and Counsel.)

(Objection overruled and exception noted.)

The Court: The jury is now present as is the defendant. You may proceed.

Mr. Hoddick: Will you read the last question to the defendant, please.

(Question read.)

Mr. Hoddick: Let me withdraw that question and reframe it.

Q. (By Mr. Hoddick): During the first two quarters of 1949 what was the gross income of your barber shop? A. Two quarters?

Q. If you remember.

A. On an average about \$600 per month, maybe a little better.

Q. And what were your expenses?

A. Maybe \$225.

Q. \$225 a month? [257] A. Yes.

Q. Then you made a net profit each month of \$375? A. Approximately.

Q. Now was it your custom, Mr. Cavness, to carry large sums of money around on you?

Mr. Miho: Objection, if your Honor please. There is nothing in the direct as to any large sums of money being carried by the defendant.

Mr. Hoddick: I will tie this in. It fits in.

Mr. Miho: I know there has been a lot——

(Testimony of Orestus Cavness.)

The Court: One at a time.

Mr. Hoddick: I say, I will tie this in. It fits in with the same subject.

Mr. Miho: Well, if you say you are going to tie it up, I would like to reserve the point that if it is not tied up, it be stricken, though it is harmful even though stricken so far as the defense is concerned.

Mr. Hoddick: I will withdraw that question.

Q. (By Mr. Hoddick): Since the barber shop was your sole source of income, was all money which you had in your possession at any time during 1949 money which you had earned from the barber shop?

Mr. Miho: Just a minute, if your Honor please, that is absolutely incompetent, irrelevant, and immaterial to the issue at stake here. I don't see the materiality of [258] this.

The Court: I can't see it as it is presently framed. I am going to sustain the objection unless you can clarify it to a greater extent. Was all money that he had in his possession derived from the barber shop?

Mr. Hoddick: That is right; money which he carried around in his pocket, was that money which came from the barber shop.

The Court: Well, without a different basis for proceeding along that line, I can't see it at the moment.

Q. (By Mr. Hoddick): You said that you saw Wells once before at a birthday party at a residence in Waikiki, except that he had a hat on?

A. Yes.



(Testimony of Orestus Cavness.)

Q. And Joe Louis was supposed to be at that birthday party?

A. Supposed to be a guest there.

Q. Did Joe Louis come?

A. He didn't show up. He only had a short lay-over; he was passing through when he was coming back from the Philippine Islands.

The Court: Joe Louis?

Mr. Hoddick: That's right.

Q. (By Mr. Hoddick): And whose birthday was it? A. Lillian Jones. [259]

Q. And is Lillian Jones a friend of yours?

A. Yes.

Q. And what day is her birthday?

Mr. Miho: Oh, your Honor, that is going very far afield, as to what day the birthday party was. I don't like to keep objecting.

The Court: Of what significance is that? Do you always celebrate your birthday on the right day?

Mr. Hoddick: All I am doing is further probing into this witness in connection with statements which he made on direct examination. I think a reasonable amount of probing is in order. Certainly, he went to this birthday party, he may not recall the exact date, he can tell me so.

Mr. Miho: I will withdraw the objection, if your Honor please, and let Counsel go into it.

The Court: Go ahead. Read the question.

(Question read.)

(Testimony of Orestus Cavness.)

A. I don't remember the exact date.

Q. Do you know approximately?

The Court: What did you say last?

The Witness: I said I don't remember the exact date.

The Court: Speak up loud so we can hear you.

Q. (By Mr. Hoddick): Do you know approximately how long before July 19 it was? One month? Two months? [260]

A. If I am not mistaken, I think it was May.

Q. Sometime in May. And how long was Mr. Wells at this birthday party?

A. That I don't know.

Q. Was he there when you got there?

A. I don't know.

Q. Did you see him come in?

A. No, I didn't.

Q. Did you notice any police officers there while Mr. Wells was there?

A. I noticed one guy presented himself as a police officer.

Q. And do you know who that was?

A. Mr. Anderson I think his name was.

Q. Was he in uniform? A. No.

Q. Was there anybody there in police uniform?

A. I don't think so.

Q. How many people were at this party?

A. I don't know.

Q. Did you know anybody else there besides Lillian Jones?

(Testimony of Orestus Cavness.)

Mr. Miho: Oh, if your Honor please——

A. Yes.

Mr. Miho: Just a moment. What if there were 200 [261] people there or 50 people, what materiality is there for him to say who was there and who was not there? Does that establish his credibility in any way, if your Honor please? There has to be a stop somewhere in cross-examination as to what is material and what isn't. We can't spend all night and all day here.

The Court: Overruled.

Mr. Miho: Save an exception.

The Court: Granted.

Mr. Hoddick: Repeat the question, please.

(Question read.)

A. Yes, I did.

Q. (By Mr. Hoddick): And who else?

A. I don't remember exactly.

Mr. Miho: Just a moment, Mr. Cavness. If your Honor please, rather than spend the time arguing on any motion for other things that may come, I believe I know what Mr. Hoddick is trying to do and I believe we should have a conference at the desk here as to whether that is his purpose or not before any harm is done.

The Court: All right. Counsel may approach the desk.

(Court and Counsel confer.)

The Court: Gentlemen of the Jury, I am going to excuse you for the day until 9 o'clock tomorrow morning and [262] see Counsel in chambers.

We stand adjourned until 9 o'clock tomorrow morning.

(Thereupon, at 3:50 p.m., December 13, 1949, an adjournment was taken until 9:00 a.m., December 14, 1949.) [263]

December 14, 1949

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness, for further trial.

The Court: Note the presence of the jury and of the defendant. Are the parties ready to proceed?

Mr. Miho: Ready.

Mr. Hoddick: Ready for the plaintiff, your Honor.

### ORESTUS CAVNESS

resumed the stand and testified further as follows:

The Court: Was there a pending question?

The Reporter: The last question was answered.

Mr. Hoddick: Would you read the last question and answer, please.

(Question and answer read.)

### Cross-Examination

(Continued)

By Mr. Hoddick:

Q. Mr. Cavness, do you deny that you pushed Mr. Wells when he came up to the car?

A. Yes.

Q. Do you deny that you had a Vicks inhaler tube?

A. Yes.

(Testimony of Orestus Cavness.)

Q. At the time this struggle took place?

A. Yes.

Q. Do you deny that you were chewing on a Vicks inhaler [264] tube during the course of the struggle, or that you bit on one? A. Yes.

Q. Do you remember what you did during the course of the struggle?

A. No, I don't, but I couldn't have bit on a Vicks inhaler because I didn't have one.

Q. What do you remember about that struggle?

A. All I remember is when I got out of the car, Mr. Wells grabbed me by my left hand and Sousa by my right. Someone called me and a few seconds after that someone struck me across the head with a blackjack, and I went down, and I don't remember anything distinctly after that until I was on my way in the house. In fact, I don't remember exactly when I was in.

Q. Did you hear Mr. Wells say, "He has got it in his hand?" A. No, I didn't.

Q. You didn't hear that? A. No.

Q. Who had hold of you when you were struck by the blackjack?

Mr. Hoddick: Withdraw that question.

Q. (By Mr. Hoddick): How do you know you were struck by a blackjack? [265]

A. That I don't know. I just assumed it was a blackjack. It was something hard. I don't know what it was, because immediately I fell forward afterwards.

(Testimony of Orestus Cavness.)

Q. What position were you in when you received this blow?

A. I was facing Mr. Wells. You know how the car is parked, huh? You know how the car was parked. Well, I was facing opposite back to the car, to the side of the car, back to the side of the car.

Q. And how close to the car were you?

A. That I don't know.

The Court: Excuse me. This "back" business I don't understand. His back or the back of the car?

Mr. Hoddick: His back to the side of the car.

The Witness: My back was facing the left side of the car.

The Court: Your back was facing the left side of the car?

The Witness: Yes.

Q. (By Mr. Hoddick): Were you standing up, sitting down, kneeling, when you received the blow?

A. I don't remember the exact position.

Q. You don't remember?

A. No. I was standing up, though.

Q. Were you falling down when you received the blow? [266] A. No.

Q. You are sure of that?

A. I don't think so.

Q. Pardon? A. No, I was not falling.

The Court: Speak louder. You said you don't recall?

The Witness: No.



(Testimony of Orestus Cavness.)

Q. (By Mr. Hoddick): What were you doing at the time you received the blow?

A. Well, they had my arms, holding, holding me up. I don't remember exactly what was happening at the time I received the blow.

Q. You might have been falling?

A. No.

Q. Well, if you don't remember exactly, how do you know you might not have been falling?

A. I wouldn't have any reason to be falling at that particular time.

Q. Was this struggle a very strenuous one?

A. That I don't know.

Q. You don't remember; is that it?

A. I don't remember exactly what took place in the struggle, during the course of the struggle.

Q. How do you account for this lack of memory on your [267] part?

A. I mean, I was hazy; a blackjack, I mean——

Q. I am talking about what happened before you were struck by the blackjack.

A. How did I account for it?

Q. Yes.

A. I don't quite understand that question.

Q. Why don't you remember what took place before you were struck by the blackjack?

Mr. Miho: If your Honor please, there is nothing in the testimony so far that this witness has stated that he doesn't know what happened before he was struck, that he was hazy or anything before

(Testimony of Orestus Cavness.)

he was struck. He has made a clear and concise statement of what happened before he was struck.

The Court: I think the objection is good.

Q. (By Mr. Hoddick): Who had hold of you at the time you were struck, Mr. Cavness?

A. Mr. Wells and Sousa, I guess. I don't remember exactly who had my right arm.

Q. Anybody else?

A. I don't remember. I know there was quite a few officers, but who had me I don't know.

Q. When you were on the stand the other day in the absence of the jury, did you tell us that at the time you were [268] struck by the blackjack Officer Marcotte had hold of you?

A. No, I didn't.

Q. If I tell you that you did say that, was that a mistake?

Mr. Miho: If your Honor please, unless Mr. Hoddick is ready to tell us that actually such a statement was made by this witness—I have no recollection of such a statement; I have no record of it——

Mr. Hoddick: I am going to ask him if such a statement was made, and I can bring in the reporter to do it.

Q. (By Mr. Hoddick): Do you deny you made such a statement?

Mr. Miho: I still object that the question is argumentative, your Honor.

The Court: Not argumentative. The objection

(Testimony of Orestus Cavness.)

is, basically, whether or not he is quoting the record correctly.

Mr. Miho: Was it direct or cross-examination?

The Court: Better get the record.

Mr. Hoddick: First of all, I am quoting the record correctly.

The Court: Do you have a transcript here?

Mr. Miho: I have the transcript here. Which is it, direct or cross-examination? Well, I ask that the entire section be quoted; otherwise, it would be an erroneous quotation of the evidence, your Honor. He is just trying to get [269] one piece out of the whole thing. Unless it is started from the first question, it would be very misleading, your Honor.

The Court: Well, you would have an opportunity to go over that. All he is asking him now is whether he made a prior inconsistent statement. He is entitled first to give him an opportunity to refresh his recollection of what he said and an opportunity to admit or deny it before he asks specifically if he didn't say this the other day.

Mr. Miho: Wouldn't it be fair to ask him the question prior to that and quote exactly what the questions and answers were?

The Court: It seems to me the setting should be laid probably, but I am not trying his case; he is.

The Court: That is true, yet, in order to acquaint the witness and direct his attention to what you are talking about, in fairness you should give

(Testimony of Orestus Cavness.)

him the setting under which he is testifying.

Q. (By Mr. Hoddick): Mr. Cavness——

The Court: Just a minute. Before you do any quoting from the record, call his attention to the situation and give him a chance to admit or deny.

Mr. Hoddick: I am going to do that. [270]

Q. (By Mr. Hoddick): Mr. Cavness, do you remember my asking you when you were on the stand the other day in the absence of the jury: "What position were you in when you got hit on the head, or hit your head; were you standing up?" And your answer was to the last question: "Yes."

Do you remember that?

A. I don't remember that question.

Q. Now, do you remember the question that I asked you immediately after that: "And who had hold of you?"

A. I remember you asking me that question and I told you Mr.——

Q. And do you remember your answer: "That I don't know"? You don't remember that?

A. Who had hold of me at the time——

Q. That's right, when you were hit on the head with a blackjack; and you said, "I don't know."

A. Well, Mr. Wells had my right hand.

Q. Then I asked: "Did Mr. Wells have hold of you?" You answered: "I don't remember exactly who it was."

Do you remember that?

A. No, I don't, but I could have made the statement.

(Testimony of Orestus Cavness.)

Q. Then I said, "Well, Mr. Wells had hold of you, didn't he?" And you answered: "I don't know definitely."

Do you remember my asking if Mr. Sousa had hold of you and you answered, "I don't know that." And I asked, "Do [271] you know if Captain Whitford had hold of you?" And you answered, "No, I don't. Only two that I remember, Mr. Shaffer and Marcotte."

Do you remember answering that?

A. Not at the time when this took place, not at the time before I was hit.

Q. What? Not at the time before you were hit?

A. You asked that question like that? Ask the question again. Maybe I don't understand it.

Q. You say that Marcotte did not have hold of you at the time you were hit; at what time were you referring to when you said Shaffer and Marcotte had hold of you?

A. I don't think I made the statement that Shaffer ever had hold of me.

The Court: Wait a minute. I don't think he is following you.

Mr. Miho: Yes, the entire part should be read, especially the last part.

Q. (By Mr. Hoddick): I show you a transcript of what took place the other day in court in the absence of the jury, starting with this question: "What position were you in when you got hit on the head?" And then, "Who had hold of you?"

(Testimony of Orestus Cavness.)

And then your answer down here in response to my question: "Do you know if Captain Whitford had hold of you?"

"No, I don't. Only two that I remember, Mr. Shaffer and [272] Marcotte."

A. I was mistaken then.

Q. You were mistaken? A. Yes, I was.

Q. Did you see anything in Mr. Wells' left hand when he came over to the car?

A. I saw something in his left hand.

Q. Is this what you saw in his left hand (indicating)? A. I don't know.

Q. Did it look like this?

A. I don't remember exactly how it looked because, I mean, I didn't pay that much attention.

The Court: The record had better describe what "this" is.

Mr. Hoddick: Excuse me. I showed the witness Mr. Wells' narcotics badge.

The Court: I don't think Mr. Wells likes your description of that.

Mr. Hoddick: Badge of Narcotics Division, Agent of the Treasury Department.

Q. (By Mr. Hoddick): Mr. Cavness, what happened after you were taken into the house?

A. When I first got in the house, Mr. Wells suggested that I sit down and get myself together, and if I remember correctly, he advised the officer to release the handcuffs on [273] me so I could wash my face and get my hair straight. So after



(Testimony of Orestus Cavness.)

that was done, I was moving around, see, so he ordered to put the handcuffs back on.

Q. You say you were moving around?

A. Yes.

Q. What do you mean you were "moving around"?

A. I was nervous or hazy or something; he said I couldn't stand still. That is what he said, and he told me to stand still or he would put the handcuffs on, so I guess unconsciously——

Q. Did you try to go out of the house?

A. No, I didn't.

Q. At any time?                      A. No.

Q. Were the handcuffs put back on you?

A. Yes.

Q. Do you know why?

A. He said I wouldn't be still, I wouldn't stand still.

Q. Who put the handcuffs back on you?

A. I don't remember exactly who. I think it was Abbey. I think it was.

Q. Do you remember how many times you fell down during the course of the struggle outside?

A. No, I don't.

Q. The only thing you remember is getting out of the [274] car, seeing Mr. Wells, and receiving some kind of a blow on your head?

A. Mr. Wells grabbed hold of me, I remember that, and I didn't receive a blow until a few seconds after. Somebody called me a "black son-of-a-bitch,"

(Testimony of Orestus Cavness.)

and in a few seconds I received a blow. That is when I fell. I don't remember anything after that. I don't even remember when they first put the handcuffs on me distinctly, but I remember when they proceeded to take me into the house.

Q. Tell me, where was Mr. Wells standing when you first saw him?

A. Right in the window of the car.

Q. In the window?

A. His head in the window.

Q. You saw him through the window then?

A. Yes.

Q. And you say that Mr. Wells did not say anything to you at that time?      A. No, he didn't.

Q. When was the first time Mr. Wells said something to you.

A. The first I remember was when we got into the house.

Q. And what did he say there?

A. I think the officer handed me the paper or something, and I said I didn't feel like it. I told him just to submit [275] it, and he told me if I didn't feel something, and I said I didn't feel like it. I told him I didn't feel like it right then, so he left it with me. In fact, I was bleeding at the time when he offered that.

Mr. Miho: Speak louder and clearer, please.

The Witness: I said, in fact, I was bleeding at the time when he offered the warrant to me, so therefore I didn't have time to read it.

(Testimony of Orestus Cavness.)

Q. (By Mr. Hoddick): Did any of the officers take you out of the house during the course of their search? A. No, they didn't.

Q. The only time you left the house was when you were taken down to the police station?

A. I was took to the hospital.

Q. Well, to the hospital, and then you went to the police station? A. Yes.

Q. What did you eat for the ten days following arrest? A. I drank mostly juices, huh.

Q. Was that pursuant to doctor's orders?

A. No.

Q. You just weren't hungry? A. What?

Q. You just weren't hungry? [276]

A. No, I had to wear a plaster, this part (indicating). This was torn loose and I had to wear a plaster all over this, so I couldn't open my mouth.

Q. Do you know what cocaine is?

A. No, I don't.

Q. Do you deny you had any in your possession on July 19, 1949? A. Yes.

Mr. Hoddick: No further questions.

The Court: Redirect.

### Redirect Examination

By Mr. Miho:

Q. Cavness, when it was all over and you were taken out of the house to be taken to the emergency hospital, did you notice anything on the ground about where the struggle took place?

(Testimony of Orestus Cavness.)

A. No, I didn't.

Q. Did you notice anything the next day?

A. Yes.

Q. What did it look like?

Mr. Hoddick: Objection. Improper redirect examination. On cross-examination we did not touch what might have been there or what might not have been there.

The Court: It is the first time we have heard anything about the next day. [177]

Mr. Miho: All right, I will withdraw it; I just wanted to get the entire picture.

The Court: All right go ahead. Technically, you are out of order.

Q. (By Mr. Miho): What did it look like, that you saw the next day? A. Like blood.

Juryman Andre: Can't hear.

Mr. Miho: Louder.

The Witness: Blood.

Mr. Miho: Now, I would like to read the rest of the part that Mr. Hoddick tried to make a lot out of, please.

Q. (By Mr. Miho): Do you remember the other day when in the absence of the Jury Mr. Hoddick was cross-examining you—I will read to you the rest of the part that he failed to read a while ago.

Mr. Hoddick asked you, "Do you know if Captain Whitford had hold of you?" You answered, "No, I don't. Only two that I remember, Mr. Shaffer and Marcotte."

(Testimony of Orestus Cavness.)

Question: "And Marcotte?" Answer: "Marcotte."

Question: "Those two had hold of you just before you got hit on the head?" Answer: "Shaffer is the one that done hit me. I am not sure because it was from behind."

Do you remember making that statement, you were hit from [278] behind? A. Yes.

Q. I ask you once more with relation to what Mr. Hoddick asked you: Are you quite sure it was Abbey, Officer Abbey—You know who Officer Abbey is, your neighbor across the street? A. Yes.

Q. Are you quite sure that it was Officer Abbey who re-handcuffed you in the house because you "won't stand still"?

A. He handcuffed me to Mr. Marcotte.

Q. That was in the house, wasn't it?

A. Yes.

Mr. Miho: That is all. Thank you.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

### THOMAS MIN

called as a witness in behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name.

The Witness: I am Doctor Thomas Min.

(Testimony of Thomas Min.)

The Court: Age?

The Witness: Thirty-two.

The Court: Residence Honolulu?

The Witness: Yes.

The Court: And you are a doctor engaged in private [279] practice?

The Witness: Yes, and I am also employed by the City and County in the Health Department.

The Court: When you say "doctor," you mean an M.D.?

The Witness: Yes, sir.

The Court: All right. You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Yes.

The Court: Take the witness.

### Direct Examination

By Mr. Miho:

Mr. Miho: If your Honor please, Mr. Hoddick is willing to stipulate that he is a duly qualified and licensed physician and surgeon in the Territory of Hawaii.

The Court: Very well.

Mr. Miho: Cavness, will you stand up and come close to Dr. Min.

Mr. Hoddick: One second, Mr. Miho. I have no desire to keep any material information from the jury. I assume that your examination of the doctor



(Testimony of Thomas Min.)

and his examination of Cavness have to do with whatever injuries Cavness received in the course of the struggle.

Mr. Miho: That is right. [280]

Mr. Hoddick: Your Honor, I submit that such evidence is entirely immaterial to the issues presented in this case and has no connection therewith, on the charge that Cavness had unlawfully purchased narcotics and had them in his possession. I object to any questions relating to that subject.

Mr. Miho: It certainly has a material bearing on the defendant's credibility and the credibility of the other officers. They don't know anything about his being hit, your Honor, not a one of them. He is the only witness who can tell us whether he received injuries on that date or not.

The Court: You may proceed.

Q. Will you take a look at this defendant's face.

Mr. Miho: Open your mouth.

(Witness examines defendant.)

Mr. Miho: All right, Cavness, resume your seat, please.

Q. (By Mr. Miho): Dr. Min, you remember seeing that man whom you have just inspected at close quarters; is that right? A. Yes, I did.

Q. Sometime on July 19 you had occasion to give him some medical attention; is that correct?

A. Yes.

Q. At the emergency hospital? [281]

A. Yes.

(Testimony of Thomas Min.)

Q. At that time what did you find wrong with him?

A. Well, at the time of the examination, he was found to have a laceration on the scalp.

Q. About how large, please?

A. Oh, approximately two inches, between two and three inches in length.

Q. And was it an open wound? The scalp was opened?

A. Well, a "laceration" would mean that the skin edges were damaged and separated to a certain extent.

Q. And what kind of a wound was it, a straight laceration or jagged?

A. It was not straight as if it was cut by a knife. It was jagged.

Q. And what else did you find wrong with him?

A. He also had contusions of the right eye and right cheek.

Q. What does that mean in layman's ordinary language?

A. Well, contusion in the right eye would be a black eye, actually, swollen, bruised; and the cheek was also bruised, and he also had a laceration of the upper lip. We cleaned the injured area, the scalp was shaved about the wound, and two clips were inserted.

Q. In the scalp wound; is that right?

A. Yes, and he was discharged to the police.

Q. Do you recall whether you plastered his mouth or not to get the wound together?

(Testimony of Thomas Min.)

A. No, I have no note of that. We did not suture or put any clips in the lip wound. The scalp was treated by clipping.

Q. Well, you have inspected his left lip right now; do you recall whether there was sufficient injury there that it had to be closed together in order to heal it?      A. No.

Q. May I go one step further: Do you recall whether the wound went to the inside?

A. Well, it extended into the inner surface of the mouth but it wasn't—at that time I didn't feel it necessary to apply any sutures.

Q. But the wound did go inside?      A. Yes.

Q. And do you recall now whether you plastered it together or not?

A. No, I am sorry, I don't remember. We did apply antiseptics and dressing.

Q. You applied sulpha I notice from your medical report.      A. Yes.

Q. Would a man receiving that kind of injuries on his lip have difficulty in eating for some time? Talking and [283] eating?

A. Well, it would be painful to take food, chewing and swallowing.

Mr. Miho: Thank you, that is all.

### Cross-Examination

By Mr. Hoddick:

Q. Dr. Min, approximately how long does it take for the symptoms of a contusion to become apparent:

(Testimony of Thomas Min.)

A. Well, generally within a few minutes; a few minutes after a blow the area would be slightly swollen, and an hour or two later the area would be discolored.

Q. It would take an hour or two, though, for it to become discolored? A. Yes.

Q. Now, is that discoloration as readily apparent on the skin of a colored person as it is on the skin of a white person? A. No, it is not.

Q. Did you put a bandage over this laceration on the scalp? A. Yes, we did.

Mr. Hoddick: No further questions.

#### Redirect Examination

By Mr Miho:

Q. May I ask, Could you tell from the type of wound [284] that you saw in the back of his head what kind of an object could have caused such a wound on the back of his head?

A. Well, any blunt object, excluding a knife, razor, or those sharp instruments, being struck with a stick or club.

Q. Have you ever seen a blackjack in your life, Mr. Min? A. Yes.

Q. A blackjack could cause such a wound; is that right? A. Well, it could.

Mr. Miho: Thank you. That is all.

Q. And what time was it that you saw him, according to your records?

(Testimony of Thomas Min.)

A. That was at 8:03 p.m. that he was first brought into the emergency room.

Q. 8:03?           A. Yes.

Q. About three minutes after eight o'clock?

A. Yes.

Recross-Examination

By Mr. Hoddick:

Q. Dr. Min, assuming that Mr. Cavness was on the ground and suddenly raised himself and hit the back of his head under the edge of the front fender of a car or under the bumper, or assuming that and supposing he hit his head in that [285] manner, is it possible that the laceration could have resulted from that type of a blow on the head?

A. Yes.

Mr. Miho: Just a moment, if your Honor please. I think that question is hypothetical, but it is not quite proper. There is no evidence that there was such a thing in this case. It is a hypothetical question on a hypothetical question.

Mr. Hoddick: There is no evidence that he was hit on the head by a blackjack.

Mr. Miho: But there is evidence that we have the blackjack on the premises.

Mr. Hoddick: You have a car.

Mr. Miho: There are no hypothetical guesses that he might have hit the car bumper.

The Court: Overruled.

Mr. Miho: Save an exception.

The Court: What is your answer, Dr.?

(Testimony of Thomas Min.)

Mr. Hoddick: The answer was "yes," your Honor.

The Witness: Yes.

Mr. Hoddick: No further questions.

Mr. Miho: That is all, Dr. Min.

The Court: Excused.

(Witness excused.)

The Court: Next witness. [286]

Mr. Miho: No further witnesses, your Honor.

The Court: Does the Government have any rebuttal:

Mr. Hoddick: Officer Marcotte, please.

### ROGER C. MARCOTTE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name, age, residence, occupation, and citizenship.

The Witness: Roger C. Marcotte; House 59 Skilled Camp, Aiea; age 28 years.

The Court: Occupation?

The Witness: Police officer with the Honolulu Police Department.

The Court: Citizenship?

The Witness: United States citizen.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.



(Testimony of Roger C. Marcotte.)

Direct Examination

By Mr. Hoddick:

Q. Mr. Marcotte, how long have you been with the Honolulu Police Department?

A. A little over three years.

Q. Do you know the defendant Orestus Cavness?

A. I do. [287]

Q. Will you point him out, please.

A. He is sitting over there next to Mr. Miho.

Mr. Miho: I will stipulate he is very well acquainted with Mr. Cavness.

Q. (By Mr. Hoddick): Did you have occasion to go to the premises of Mr. Cavness on July 19, 1949?

A. I did.

Q. Were you in the house with Mr. Cavness that evening?

A. Yes, I was.

Q. Were you there when—Was Mr. Cavness handcuffed or not when you arrived?

A. When I arrived at the scene, he was handcuffed.

Q. Were those handcuffs taken off at any time?

A. Yes, they were.

Q. And where were they taken off?

A. After we entered the house.

Q. What transpired after they were taken off?

A. Well, Mr. Wells is the person who ordered the handcuffs taken off, and they were taken off, and Mr. Cavness was asked to have a seat. He was very nervous and kept jumping and moving around,

(Testimony of Roger C. Marcotte.)

and was very excited, and was very much worried about people going into his bathroom, and somebody was standing out in front near the car.

Mr. Miho: Just a moment, if the Court please. I move that any statement as to what he thought was in the [288] mind of this defendant, if your Honor please, be stricken, and he be confined only to what he saw or what he didn't see, and on rebuttal only. He is a rebuttal witness here.

Mr. Hoddick: I stipulate, your Honor that that remark of Mr. Marcotte that Mr. Cavness was worried about anybody going into his bathroom may be stricken.

The Court: All right, it may go out. The jury is instructed to disregard it.

Q. (By Mr. Hoddick): Were the handcuffs placed back on Mr. Cavness?

A. Yes, sir, they were.

Q. Why?

A. He tried to run out of the house.

Mr. Miho: If your Honor please, I move that be stricken. He has only to tell us what Cavness did, and the only thing he has told us is that Cavness was nervous and couldn't sit down. There is nothing for him to say that he was trying to run out of the house.

The Court: He is here saying so.

Mr. Miho: That is a conclusion. He has been saying he was nervous, couldn't sit down. There is nothing so far that he was running out of the house.

(Testimony of Roger C. Marcotte.)

The Court: He just said so. Overruled.

Mr. Miho: Save an exception.

Mr. Hoddick: No further questions. [289]

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Did he ever run up to the door to try to get out?

A. That is why I caught him, at the door.

Q. At the door? A. Yes, sir.

Q. You and who else caught him at the door?

A. Myself.

Q. Which door? A. The front door.

Q. And how many officers were on the place?

A. Officer Pestano I believe was in the same room.

Q. And who else? You, Officer Pestano, I imagine Wells was there, too?

A. I believe he might have been.

Q. And Shaffer was there?

A. I don't know whether he was in that room or not.

Q. At least there were five or six officers in the room? A. No, sir, not that one room.

Q. You mean you got to the scene before the other officers got there? A. No, sir.

Q. Where were they?

A. They were making a systematic search of the house. [290]

Q. They were searching already?

(Testimony of Roger C. Marcotte.)

A. I believe they were.

Q. They were making a search when you got there?  
A. No, not when I got there.

Q. When he tried to escape?

A. That's right.

Q. When he tried to escape they were in the process? Were they or weren't they?

A. They were receiving instructions from Mr. Wells.

Q. Where were you?

A. Right alongside of Cavness.

Q. And who else was with you?

A. I believe Pestano was standing off to the side near the bathroom entrance at the time. That is about all that I can visualize was there.

Q. Pestano was near the bathroom door?

A. Yes.

Q. And you were in which room, the living room or bedroom?  
A. In the living room.

Q. In what part of the living room?

A. Right next to his armchair.

Q. And where is that armchair?

A. It is straight in about——

Q. Across the living room from the door; isn't it? [291]  
A. That's right.

Q. And he was trying to reach the door from there with you right there, to try to escape from you?  
A. I was standing alongside of him.

Q. Across the living room, you were standing

(Testimony of Roger C. Marcotte.)

by the armchair right by him and he tried to escape from the front door?

A. That is correct.

Q. You are sure you are telling us the truth under oath, aren't you?

A. I most certainly am.

Q. Tell us whether he was bleeding at that time or not?      A. Yes, he was.

Q. He was still bleeding?      A. Yes, sir.

Q. In other words, he hadn't received first aid yet?      A. No, sir.

Q. And who was he handcuffed to, again?

A. I handcuffed him to myself.

Q. You handcuffed him?      A. Yes, sir.

Q. It was not Abbey who handcuffed him at that time?      A. No, not that time.

Q. When was it that he handcuffed him?

A. I understand he might have handcuffed him outside. [292]

Q. You understand he might have handcuffed him outside, but so far as in the room was concerned, you are the only one who handcuffed him?

A. Yes.

Q. And how many times did you handcuff him?

A. Only one time.

Q. Only one time. And how long did you have him handcuffed to you?

A. Oh, for approximately ten minutes.

Q. Then what did you do?

A. Well, he promised that he wouldn't run away again and he would relax.

(Testimony of Roger C. Marcotte.)

Q. He promised he wouldn't run away again?

A. That is correct.

Q. Give us his exact words. What did he say to you?

A. Well, I told him—He didn't say anything. After I asked him if he would sit down and relax and take it easy, I would take the handcuffs off him, you know, he said "OK, I can take it easy now."

Q. So you took the handcuffs off?

A. So I took the handcuffs off.

Q. So he never said anything about running away? A. No.

Q. You never asked him whether he would run away again? A. I did, yes. [293]

Q. You never told us just now; you recited the entire conversation?

A. I didn't recite the entire conversation.

Q. You didn't tell us he said he wouldn't run away.

A. You interrupted me before I had time to recite the entire conversation.

Q. All right. I won't ask you any more questions on that one.

Did you go into the bathroom after you released him, after ten minutes or so, you say, when he tried to wash himself? A. I did.

Q. Do you remember Paul Shaffer going in or coming in at some time during that operation?

A. No. I remember Pestano being in there. I was directly by him.



(Testimony of Roger C. Marcotte.)

Q. Did you hear anything, by any officer's conversation or such, to this effect, that "You must have hit your head on a bumper and that is how you got the injuries in the back of your head"?

A. I heard something to that effect.

Q. Who said such a thing, if you know?

A. I don't recall just now.

Q. Do you remember Mr. Wells' telling you, "Why don't you take that handcuff off of Cavness?"; do you remember Mr. [294] Wells' telling you that?

A. Mr. Wells did order me to take the handcuffs off Cavness. That was the first time before he was handcuffed the second time by myself.

Q. But you didn't abide by his instructions right away, did you? It took Mr. Wells some time to get you to finally release the handcuffs off Cavness; is that right?

A. I believe I had to get a key.

Q. Wasn't it your handcuff? Didn't you tell me you handcuffed him?

A. The second time it was my handcuff, the time he was handcuffed in the house, Mr. Miho.

Q. That was your handcuff?

A. That was my handcuff.

Q. Well, the keys were with you? A. No.

Q. Well, who holds the key to your handcuffs?

A. I don't have to take my keys around with me.

Q. How did you get the handcuffs released if you didn't have the key?

A. I borrowed a key from somebody else.

(Testimony of Roger C. Marcotte.)

Q. You mean the handcuff is uniform?

A. That is correct.

Q. It goes to release any handcuff?

A. That is correct. [295]

Q. Thank you for that information. I will remember that.

Q. You didn't have your key? A. No, sir.

Q. So if you handcuffed somebody by error and that person was ready to bleed to death, you couldn't borrow a key, you would let him bleed to death; is that the kind of an officer you are?

A. I guess he would have to bleed to death.

Q. If this defendant was seriously injured at that point, he had a cracked skull and the time was also important to this defendant——

A. He wouldn't have been handcuffed.

Q. (Continuing): ——and you couldn't borrow a key, what would you do, let him bleed to death?

A. He wouldn't have been handcuffed.

Mr. Miho: You are some officer. That is all.

Mr. Hoddick: No further questions.

The Court: Next witness.

(Witness excused.)

Mr. Hoddick: No further witnesses, your Honor.

The Court: Any surrebuttal?

Mr. Miho: No, your Honor.

The Court: The evidence on both sides is submitted then? [296]

Mr. Miho: Yes, your Honor.

Mr. Hoddick: Yes, your Honor.

The Court: Very well, are your requested instructions on both sides ready?

Mr. Hoddick: Yes, we have ours ready.

Mr. Ahrens: Your Honor, at this time we would like to move for a judgment of acquittal on the grounds as previously stated, that the evidence is insufficient to sustain a conviction. We would like to be heard on the motion in the absence of the jury.

The Court: All right. State your grounds first and I will hear argument. The same grounds?

Mr. Ahrens: The same grounds.

The Court: All right, I will excuse the jury at this time until 2 o'clock this afternoon.

(Exit jury.)

(Argument by Counsel out of hearing of jury.)

(Motion denied and exception taken.)

(Thereupon, at 11:10 a.m., a recess was taken until 2:00 p.m. of the same day.) [297]

#### Afternoon Session

The Court: Criminal 10,256. Note the presence of the jury and of the defendant, together with his attorney.

The evidence being submitted at this time, Counsel may present their respective arguments to the

jury. Mr. Hoddick, you may present your argument first.

(Argument by Mr. Hoddick.)

(Argument by Mr. Miho.)

The Court: We will take a short recess.

(Recess had.)

The Court: Note the presence of the jury and the defendant, together with his attorney. Mr. Hoddick you may reply.

(Argument by Mr. Hoddick.)

The Court: Gentlemen of the Jury, if I may now have your attention I will give you the rules of law that are applicable to this case to guide you in reaching a verdict.

Someone has said in the course of argument that this is an important case. It is. Every criminal case is important, important to both the Government and to the defendant. You can readily recognize why, in that every case of a criminal nature involves the possibility, upon conviction, of someone's being deprived of his freedom. Consequently, it is appropriately and correctly said that this is an important case, [298] and I am sure you recognize it as such.

Last September the grand jury, upon hearing only that which the Government presented to it, in other words, upon hearing only one side of the case, determined that this defendant should be indicted for violating a particular Federal law, and, conse-

quently, the grand jury returned an indictment, to which the defendant pled not guilty, and thus the issue was framed which you gentlemen have been called upon to determine, you having the advantage of hearing both sides of the case, the Government's side and the defendant's side.

The indictment reads that

“The Grand Jury Charges:

“That on or about the 19th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Orestus Cavness, did knowingly, wilfully, unlawfully and feloniously purchase a derivative of cocoa leaves, to wit, 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.”

Now that is the charge which the Government has laid and which it is incumbent upon it to prove as charged beyond a reasonable doubt. That is true in every criminal case. The Government must sustain its charge beyond a reasonable doubt. [299] It must prove each and every essential element of the crime to your satisfaction beyond a reasonable doubt, which I will define for you in a moment.

The pertinent law on this subject, in so far as narcotics are concerned, provides that a tax shall be levied and paid upon cocoa leaves, “any compound, salt, derivative, or preparation thereof produced in, or imported into, the United States, and

sold, or removed for consumption or sale—" and it describes the manner in which the tax shall be paid.

It further provides, coming directly to Section 2553(a), which is the section under which this charge is laid, that

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a)—" which is the section I started to refer to, being a general reference which includes cocoa leaves. Repeating:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; . . ."

It goes on to provide certain exceptions, namely, that [300] the provisions of the section which I have just read to you shall not apply "to any person having in his or her possession any of the drugs mentioned in Section 2550(a) which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer



upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription."

The other exception is that this law shall not apply "To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away."

Now, you will notice that the indictment here charges this defendant with having knowingly, wilfully, unlawfully, and feloniously purchased, with having purchased, as I have just described, having "knowingly, wilfully, unlawfully and feloniously purchased a derivative of cocoa leaves, to wit, [301] 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), . . ."

This indictment simply states the charge. It is not in the slightest degree evidence of any description. So, from the fact that the defendant has by the grand jury been charged, or indicted, you are not to draw any inference whatsoever adverse to the defendant. It is incumbent upon the Govern-

ment, to repeat, to prove the charge as laid beyond a reasonable doubt.

I direct your attention to the fact that the indictment alleges an unlawful purchase, but you have heard little, if anything, in this trial of a purchase. The reason is that this particular Federal law is unique in that it provides that once the Government has established that there was conscious possession of one of the described drugs by a person, that person has the burden of explaining satisfactorily that that possession was lawfully acquired. There are very few Federal laws that have such a presumption, but this is one.

And I read it again from the statute;

“And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found.”

Consequently, it was incumbent upon the Government here, and it still is, to have proven to your satisfaction beyond a reasonable doubt that the articles introduced in evidence did contain a drug described by this law, namely, cocaine; that they did not have any tax-paid stamps upon them; and that the defendant did have conscious possession of them.

At that point, if the Government has proven those three elements to your satisfaction beyond a reasonable doubt, it is then incumbent upon the defendant, under his particular law, to explain to your satis-

faction that his possession of those drugs was legitimate and lawful.

In this particular case the defendant has denied that he possessed the articles which the Government asserts and alleges that he had possession of. Consequently, this case is reduced to a question of, basically, whether or not the Government has proved beyond a reasonable doubt that he did or did not have possession, consciously, of capsules containing the drug cocaine, which capsules, so containing cocaine, did not have upon them stamps indicating that they were tax paid. As I have indicated before, this is the framework position of this case, and I repeat again that the indictment which charges this offense is in no sense evidence or proof that the defendant has committed the alleged crime; that it is incumbent upon the Government to prove beyond a reasonable doubt that which I have outlined to you in order to sustain [303] the charge.

A few preliminary remarks and then I will come directly to some specific instructions.

As you probably have gathered from your experience at this trial, though it be your first one, as jurors in this court, evidence is of two kinds, namely, direct, positive evidence and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. On the other hand, circumstantial evidence is proof of such facts and circumstances sur-

rounding a crime from which a jury may infer others and connected facts which usually and reasonably follow according to the common experience of mankind. Circumstantial evidence is regular and competent at the trial of a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence in any sense would have to be considered by you in connection with other evidence produced, but to be of value the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of guilt.

A reasonable doubt, gentlemen, which I have promised I [304] would define for you, is not as mysterious as it sounds. It is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly detestable duty. It must be a substantial doubt, such as an honest, sensible, fair-minded man might with reason entertain consistently with a conscious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility, and decision, in determining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is

created by the want of evidence, as well as possibly the evidence itself.

It is not, however, a speculative, imaginary, or conjectural doubt. It is not incumbent upon the Government in the trial of any criminal case to prove its case beyond all possibility of doubt. That would be impossible.

A juror, however, must be satisfied beyond a reasonable doubt, and he is so satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

You gentlemen are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, [305] their manner of testifying, their apparent candor or frankness or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly.

In determining the weight to be given the testimony of the witnesses, you are authorized to consider their relationship to the parties, if any, their interest, if any, in the result of this case, their temper, feeling, or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any witness in this case has knowingly or wilfully sworn falsely to any material fact in this trial, or



that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading, or imposing upon you, then you have the right to reject the entire testimony of such witness, except in so far as the same is corroborated by other credible evidence, or believed by you to be true.

Now, gentlemen, if during the trial I have referred to any fact in this case, it has not been to intimate to you any opinion which I have of that fact, although I have the right, under the law, to express an opinion on that subject. However, it is not my purpose to invade the province of the jury. It is your duty to find the facts of this case. It is your [306] exclusive duty. You and you alone are the judges of the facts of this case and of the credibility of the witnesses. If you have any idea that I have an opinion about this case of the guilt or innocence of this defendant, I want you to disregard it. I want you to arrive at your own independent conclusion from the evidence which has been presented and all the circumstances detailed by the witnesses.

Every defendant in a criminal case, and in this case, enters upon the trial clothed with a presumption of innocence. Every defendant is presumed to be innocent until he is proved guilty by the requisite degree required by the law, namely, beyond a reasonable doubt. This presumption of innocence is not a mere form to be disregarded by the



jury at pleasure, but it is an essential, substantial part of the law of the land, and it is binding upon the jury in this case, as in all criminal cases, and it is the duty of the jury, to give the defendant in this case the full benefit of this presumption and to acquit the defendant unless the evidence in the case convinces you of his guilt as charged beyond a reasonable doubt.

This presumption of innocence remains with the defendant until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt, and if, upon full consideration of all of the facts and circumstances in evidence, you entertain a reasonable doubt of his guilt, you [307] must give him the benefit of it and acquit him.

It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exist in the mind when the jury is not fully satisfied as to the truth of a criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the Court, you are not satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you must return a verdict of acquittal.

As I have indicated, it is incumbent upon the Government to have proved to your satisfaction

beyond a reasonable doubt that the defendant knowingly had conscious, physical possession of the cocaine upon which there were no tax-paid stamps before the statutory presumption comes into operation. Conscious, physical possession of cocaine by the defendant, as I have indicated by my reference to the statute, creates a presumption that the defendant unlawfully purchased such cocaine as charged in the indictment.

While the indictment charges the defendant with the unlawful purchase of eight capsules of cocaine, you may convict the defendant if from the evidence and from it alone, and [308] on the basis of the presumption of guilt arising from possession of cocaine, you find that beyond a reasonable doubt the defendant unlawfully purchased any quantity of cocaine. If you are convinced beyond a reasonable doubt that the defendant had in his possession and knew that he had in his possession cocaine to which the appropriate tax-paid stamps were not affixed, you must find the defendant guilty of the offense charged in this indictment, for the defendant has not explained any possession; indeed has denied having possession.

However, if you have a reasonable doubt as to whether or not the defendant had cocaine in his conscious and physical possession on July 19, 1949, that doubt you must resolve in favor of the defendant and return a verdict of not guilty.

“Possession” is a term of common meaning and understanding and it means that it is a condition of

facts under which one can exercise his power over a physical thing at his pleasure to the exclusion of all other persons. I believe I have already covered this, but I will go over it once again in accordance with this requested instruction. As I have said, the defendant is presumed to be innocent and that presumption of innocence remains with him until his guilt is established by the evidence to your satisfaction beyond a reasonable doubt; and if, after a full consideration of all of the facts and circumstances in evidence, you do entertain a reasonable doubt of his guilt, then you must give him the [309] benefit of it and return a verdict of not guilty.

However, if you find from the evidence that the defendant had conscious, physical possession of a quantity of cocaine upon which there were no tax-paid stamps, then a presumption arises under the law that the defendant is guilty of the offense charged in the indictment.

From time to time during the course of the trial, upon appropriate motions, the Court ordered stricken from the record and from the consideration of the jury certain things and further instructed the jury that, being stricken, that material could not be considered by you. I remind you once again that in your deliberations you may not under any circumstances consider anything that has been stricken from the record in this case. You are to decide this case upon the evidence which the Court allowed to come before you, and upon that alone.

I also wish to invite your attention to the fact

that if you have derived any notions of how I might feel, based on any of my rulings made during the course of the trial, you must completely disregard that, for the rulings during the course of the trial are not for your consideration. They are not evidence. The Court, in making its rulings, was not expressing any opinion of the guilt or innocence of the defendant, but was merely ruling the issue which the jury is to determine after weighing all of the testimony in this case in the light [310] of the rules of law expressed in the Court's instructions.

You are the sole judges of the sufficiency of the evidence and the credibility of the witnesses, and in passing on the credibility of such witnesses it is your right and your duty to take into consideration their prejudices, if any, their motives for testifying as they have done, or any other influences surrounding them, which may have induced them to testify in a particular way, if any such have been shown by the evidence in this case.

In considering the evidence, if you can reasonably account for any act in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to so do, and if you have a reasonable doubt of his guilt, you must acquit him. If the testimony in this case in its weight and effect be such as to warrant two conclusions, the one favoring the defendant's innocence and the other tending to establish his guilt, law and justice demand that the jury shall adopt

the former and find the accused not guilty. Under such circumstances the Government would not have proved its case as required beyond a reasonable doubt.

An inference of fact cannot be drawn from premises which are uncertain, but the facts upon which an inference may legitimately rest must be established by direct evidence as if they were the very facts in issue. It follows, therefore, that one presumption cannot be based upon another presumption. [311] To find a fact by presumption or inference, the inference should be a logical deduction and reasonably certain in the light of all the other proper presumptions and collateral facts.

I am sure that you are aware of this, but I wish to instruct you in this regard: A person charged with a crime cannot and must not be convicted upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him of being guilty. What the law requires, before a person can be convicted of crime, is not suspicion, not mere probabilities, but proof which excludes all reasonable doubt of his innocence.

If, after considering the whole of the case and after full deliberation with your fellow jurors, any juror should still entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty nor to be influenced in so voting



for the single reason that others of the jury shall be in favor of a verdict of guilty.

I believe, gentlemen, the requested instructions have been adequately covered and that, taken together with the Court's general instructions, they are sufficient to enable you to reach a verdict in this case. I am going to excuse you in a moment and for but a moment while I hear the attorneys [312] briefly on a point of law, after which you will be recalled and allowed to retire to the jury room. Unfortunately, the jury room in this buliding is not all that it should be, so I am perfectly willing to exclude everyone from the court room and allow you to use the court room as the jury room. I am sure you will be more comfortable.

Then when you do retire to deliberate upon your verdict your first order of business will be to elect from amongst your number one to serve as foreman. After you have deliberated upon your verdict and have reached a verdict, you will notify the Marshal, and he in turn will notify the Court, and the Court will convene to receive your verdict.

Two forms have been prepared for your use, and you will use the form which corresponds to the verdict which you have reached.

At this time and before swearing the Marshal to take charge of the jury, I will ask the jury to step outside a moment while I hear Counsel. Don't go too far away.

(Exit jury.)



The Court: The jury is now absent.

(Defense objected to refusal to give Defendant's Instructions Nos. 1, 12, 13 and 16; to No. 15 given as amended; also to the giving of Government's Instructions Nos. 5, 6 as amended, and 8. The objection to No. 6 was on the grounds that it was incomplete inasmuch as the words "or not from the [313] original stamped package" were not included. Objection also on the basis that the presumption is unconstitutional as amended in 1944, with reference to the instruction concerning presumption.)

(Objection overruled. Exception noted.)

The Court: The record may now show that the jury has been recalled and is present, as is the defendant.

It is in order now to swear the Marshal to take charge of the jury during the time it is deliberating.

Before we do that, however, I want to say that to the jury during their deliberations will be available the things which have been admitted in evidence, and only those things, plus the actual indictment, which, I again repeat, is not evidence, but is simply a formal charge which the Government is required to prove to your satisfaction, as I have told you so many times, beyond a reasonable doubt.

Now, Mr. Clerk, I believe I have taken care of all of the odds and ends. You may proceed to swear the marshals.

(Marshals Otto F. Heine and Emmanuel Moses sworn.)

The Court: Very well, the court room will be cleared and turned over to the jury. The exhibits will be available. The jury may call for them, or they may indicate that they wish them left here. Do you want them left in the room?

Juryman: Yes. [314]

The Court: All right. Mr. Clerk, leave the exhibits.

(The jury went out for deliberations at 4:30 p.m. and returned at 6:10 p.m.)

The Clerk: Criminal 10,256.

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Gentlemen of the jury, I am advised by the Marshal that you have arrived at a verdict. Is that correct? Who is the foreman?

Mr. Andre: Yes, your Honor.

The Court: Mr. Andre, that is a correct report that the jury has arrived at a verdict; therefore, will you please, being the foreman, hand the verdict to the Clerk. The defendant will rise. The Clerk will read the verdict.

The Clerk: (Reading): "Verdict.

"We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, Orestus Cavness, guilty as charged in the indictment herein.

“Dated: Honolulu, T. H., this 14th day of December, 1949.

“/s/ LEO F. ANDRE,  
“Foreman.”

The Court: Such, Mr. Foreman, is the verdict of the [315] jury?

The Foreman: Yes, your Honor.

The Court: So say you all, gentlemen of the jury?

The Jury: Yes.

The Court: Very well, let the verdict be recorded.

Mr. Ahrens: At this time we would request that the jury be polled.

The Court: Very well. Will you poll the jury, please.

Mr. Koseke, what was your determination on the issue?

Mr. Koseke: Guilty, your Honor.

The Court: Thank you. Mr. Parish?

Mr. Parish: Guilty, your Honor.

The Court: Mr. Anderon?

Mr. Anderson: Guilty, your Honor.

The Court: Mr. Dole?

Mr. Dole: Guilty, your Honor.

The Court: Mr. Hatchell?

Mr. Hatchell: Guilty, your Honor.

The Court: Mr. Benedict?

Mr. Benedict: Guilty, your Honor.

The Court: Mr. Yoshioka?

Mr. Yoshioka: Guilty, your Honor.

The Court: Mr. Clark?

Mr. Clark: Guilty, your Honor. [316]

The Court: Mr. Bomke?

Mr. Bomke: Guilty, your Honor.

The Court: Mr. Andre?

Mr. Andre: Guilty, your Honor.

The Court: Mr. Moyers?

Mr. Moyers: Guilty, your Honor.

The Court: Mr. Turner?

Mr. Turner: Guilty, your Honor.

The Court: Very well, the poll of the jury may be recorded and the verdict may now be recorded.

Mr. Ahrens: At this time we would like to note an exception to the verdict as being contrary to the law and weight of the evidence.

The Court: It may be noted at this time. The jury is excused.

(Thereupon, at 6:20 p.m., December 14, 1949, the hearing in the above-entitled matter was adjourned.) [317]

#### Certificate

I, Lucille Hallam, Official Reporter, United States District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Criminal No. 10,256, United States of America v. Orestus Cavness, December 12, 13 and 14, 1949, before Hon. J. Frank McLaughlin, Judge.

Dated: January 26, 1950.

/s/ LUCILLE HALLAM. [318]

In the United States District Court  
for the District of Hawaii

Criminal No. 10,256

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORESTUS CAVNESS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

As to testimony, stipulations, and rulings in the  
above-entitled matter, held in Honolulu, T. H., De-  
cember 29, 1949.

Before:

HON. J. FRANK McLAUGHLIN,  
Judge, and Jury.

Appearances:

K. MIHO, ESQ., and  
JOHN E. AHRENS, ESQ.,

Fong, Miho & Choy,  
Suite 202, Alakea Building,  
Honolulu, T. H.,

Attorneys for the Defendant.

HOWARD K. HODDICK, ESQ.,  
NAT RICHARDSON, JR., ESQ.,

Assistant United States District Attorneys,  
Appearing for the Plaintiff.

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness. Hearing on motion of judgment of acquittal and alternative motion for a new trial.

The Court: This is the day appointed to hear the motions.

Mr. Ahrens: That is right, sir. We are ready for the Defendant.

The Court: Very well, is the Government also ready?

Mr. Hoddick: Ready for the Plaintiff, your Honor.

The Court: All right, Mr. Ahrens.

Mr. Ahrens: The Court indicated on prior hearing it desired that the argument be confined mainly to the two new points, unless other new arguments were to be put forth with reference to the other grounds.

The Court: That is right.

Mr. Ahrens: Now, I will confine the argument mainly to the two new matters, with the exception of going slightly into the question of Constitutionality. I have been fortunate enough to trace the history of the law, so I will dwell on that for a few minutes.

The Court: Yes.

Mr. Ahrens: But, nevertheless, it is still earnestly [1] urged that the grounds as argued previously still be taken into consideration by the Court.

The Court: Yes.

Mr. Ahrens: With reference to the matter of Mr. Samuel A. Parish's being a reserve police



officer, I believe Mr. Hoddick will be willing to stipulate that Mr. Parish is a member of the reserve police organization in the City of Honolulu.

Mr. Hoddick: That is correct.

The Court: Also, I think it can be agreed by all that since the last time I talked to you, the reporter in reading further in her notes did find something at variance with what I had told you the other day.

Mr. Ahrens: Yes, sir, thank you.

The Court: All right. Mr. Parish, one of the jurors selected and sat on the trial was a member of the reserve police.

Mr. Ahrens: First of all, I would request that the reporter read back that particular part of the transcript relating to the question that Mr. Miho put to the jury as a whole when questioning one particular juror, and I believe Mr. Hoddick will be willing to stipulate that Mr. Parish at that time, although not in the jury box, was present in the court room as a member of the panel at large and within hearing distance of the question. Will you stipulate to that [2] Mr. Hoddick?

Mr. Hoddick: I don't know whether Mr. Parish heard the question put to the jury box or not.

Mr. Ahrens: The stipulation I am requesting is that Mr. Parish was within hearing distance.

The Court: If Mr. Miho spoke loud enough.

Mr. Hoddick: That is a matter of fact.

The Court: He was in the room when Mr. Miho said whatever he did say. Whether he actually heard or not, we don't know.

The Reporter (Reading): "Question (By Mr. Miho): Have any of you jurymen served as police reserve officers in the police force at any time?"

Mr. Hoddick: Who was he questioning?

The Reporter: Mr. Kramer.

(Argument by Mr. Ahrens as to matter of Mr. Parish.)

Mr. Ahrens: Now I would like to touch briefly on the question of the constitutionality——

The Court: Before you come to that, how about your other point about the juror who made the telephone call?

Mr. Ahrens: Well, I can get to that now, if you want me to.

The Court: I think it logically relates to this matter. If it throws you off——

Mr. Ahrens: No, no, not at all. I will want—I think it will be necessary, may it please the Court, that we have Mr. Heine and Mr. Moses, and Mr. Clark called as witnesses in the case in that particular order.

The Court: All right. Will you arrange to line them up in that order. I will take a recess and hear them after the recess.

(Recess had.)

The Court: On this point, you, Mr. Ahrens, wish to introduce evidence?

Mr. Ahrens: May it please the Court, I would like Marshal Heine to be called to the stand, please.

The Court: Mr. Heine.

OTTO F. HEINE

called as a witness by attorney for the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ahrens:

Q. Will you state your name, age, residence, occupation, and citizenship, please.

The Court: Excuse me?

Mr. Ahrens: Is that necessary, your Honor?

The Court: It is not absolutely necessary, but you tickled my fancy by doing it.

The Witness: My name is Otto F. Heine; age 63; residing at 929 Ocean Drive, Honolulu, Territory of Hawaii. [4] At present I am United States Marshal for the District of Hawaii, Territory of Hawaii.

The Court: Citizenship?

The Witness: Beg pardon?

The Court: Citizenship?

The Witness: I am, sir.

The Court: Citizen of the United States?

The Witness: Citizen of the United States of America.

The Court: Exclusively?

The Witness: Exclusively.

(Witness temporarily withdrawn to have questions asked of Mr. Parish read by the reporter.)

(Witness resumed stand.)

(Testimony of Otto F. Heine.)

Q. (By Mr. Ahrens): Mr. Heine, on December 14 of this year were you duly authorized by the Clerk to take charge of the jury in Criminal No. 10,256?

A. I would answer that question "yes" together with Deputy Moses.

Q. Were you instructed not to talk to any of the jurors, and were you instructed not to allow them to talk to anyone other than themselves?

A. I was.

Q. Did any of the jurors——

Mr. Ahrens: I withdraw that question. [5]

Q. (By Mr. Ahrens): Mr. Heine, what happened after you locked the jury in the court room?

A. The jury was not locked up, sir, at that time.

The Court: Wait a minute, Mr. Heine.

The Witness: He asked me the question.

The Court: Yes, I know. You know what he is asking for, but that isn't the question he asked you. He asked you what happened after they were locked up.

The Witness: I understood him the other way.

Q. (By Mr. Ahrens): Will you relate to us the events, chronologically, that happened, from your own knowledge, so far as you know, from the time that you were authorized to take charge of the jury, together with Mr. Moses.

A. From the time I was authorized by the Court to take care of the jury, one of the jurors

(Testimony of Otto F. Heine.)

by the name of Herbert Clark came to me and asked me if he could 'phone his garage. That was before they started deliberating.

Q: Let me interrupt you one second. Where were you at this time? Was the court room cleared?

A. The court room was absolutely cleared.

Q. Absolutely cleared?

A. Yes, sir.

Q. Just the jury, you, and Mr. Moses present?

A. The jury, myself, and Deputy United States Marshal Emanuel Moses. [6]

Q. Will you go on, please.

A. Beg pardon?

Q. Will you continue from the time Mr. Clark approached you.

A. Well, after that, as I told you, one of the jurors asked me if he could 'phone his garage. He was very anxious about their locking it up and he wouldn't be able to get to his garage.

Q. Do you know his name?

A. Yes. Herbert Clark.

Q. Thank you. Go on.

A. I told him "yes." So I sent Deputy Moses along with him to see that he spoke nothing else, just about the automobile. And at that time I stayed behind to take care of the other eleven jurors, while Moses in company—while Mr. Clark, in company of Deputy Moses, went to my private office. And Mr. Thomas R. Clark, my chief deputy,

(Testimony of Otto F. Heine.)

was sitting there, too. What conversation they had I don't know.

Q. Are you telling this of your own knowledge as to what happened in your office, so far as Deputy Clark is concerned?

A. I saw Deputy Clark sitting there. I don't know what happened. I was in the court room at that time, Mr. Ahrens.

Q. When Mr. Clark approached you, do you recall his [7] exact words?

A. Approached me here in the court room?

Q. Yes.

A. Yes, he said he wanted to telephone to the garage about his automobile.

Q. What?

A. About his automobile.

Q. That is the best that you recall?

A. Yes.

Q. That was the only thing that he wanted to make a 'phone call about?

A. I believe so.

Q. That is all that you know?

A. That is all that I know.

Q. Was Mr. Moses present at the time Mr. Clark approached you?

A. Yes, Mr. Moses was in the court room.

Q. How far away was Mr. Moses from you?

A. I don't know. I didn't look around where Moses was.

Q. You state that you called Mr. Moses to take



(Testimony of Otto F. Heine.)

charge of Mr. Clark and allow him to make a 'phone call; is that correct?      A. What?

Q. What were your instructions to Mr. Moses with [8] reference to Mr. Clark?

A. I told Deputy Moses to accompany Mr. Herbert Clark to my office to telephone the garage about his automobile.

Q. You didn't authorize him to allow Mr. Clark to make any other calls?

A. No, I did not authorize him. I didn't know he was going to make any other calls.

Q. You don't know from your own knowledge that he did make any other calls, do you?

A. I do not.

Q. Do you know from your own knowledge whether he made any calls?

A. I saw him use the 'phone.

Q. You saw him use the 'phone. Where did you see him?

A. From the door here, the court room door.

Q. And Mr. Clark, you stated, was in your office?

A. Mr. Clark was in my office, together with Deputy Emanuel Moses, Jr., and my chief deputy, Thomas R. Clark.

Q. Did you consult the Court before you authorized Mr. Moses to take charge of Mr. Clark and allow him to make a 'phone call?

A. I did not, Mr. Ahrens.

Q. Did you consult the Court with reference to Mr. Clark at any time?

(Testimony of Otto F. Heine.)

A. I did not, sir. [9]

Q. Could you give us the usual practice——

Mr. Ahrens: Withdraw the question. That is all.

Cross-Examination

By Mr. Hoddick:

Q. One moment, Mr. Heine.

A. Pardon me?

Q. Has it been customary before a jury retires, for purposes of deliberation, to permit members of that jury to make calls to their families and advise them that they might not be home for supper?

Mr. Ahrens: I object, your Honor. That is immaterial. It has nothing to do with the case, what the usual practice is. It is what the Court instructed the Marshal to do in this case that counts. It is not what the usual practice or former instructions of the Court were.

The Court. Sustained.

Mr. Hoddick: Will your Honor hear me on that point, please.

The Court: All right. I will withdraw the ruling.

Mr. Hoddick: The question here is, basically, whether the act of the juror prejudiced the defendant in any manner, and there is a presumption that where a juror talks with a third party, that that conversation might have been prejudicial if it had a bearing on the case.

(Testimony of Otto F. Heine.)

Now, if we have in this court a practice of permitting [10] jurors to call their families to send personal messages in contemplation of the fact that they might be locked up here or kept together for an extended period of time: "I won't be home in time for dinner," or "Please don't lock the door to my garage; I want to get the car," if that has been the practice, I think it lends weight to the fact that that type of message has long been considered permissible by this Court and not being prejudicial to the defendant. It also lends to Mr. Heine or Mr. Moses authority to permit such calls to be made without in each instance having to go to the Court. In other words, if Mr. Heine on previous occasions has gone to his Honor sometime in the past and has said that so-and-so juror wants to call his family and tell them he may not be home for supper, and the Court says, "OK, make that telephone call," and if that is done over an extended period of time, it is only natural Mr. Heine or Mr. Moses would permit jurors to make such telephone calls so long as the conversation did not relate to the case.

Mr. Ahrens: Your Honor, it is the principle of the thing in this case that counts. The Court specifically instructed the Marshal as to what he was to do, and the Marshal possibly could have gone about it in another method. Certainly he should have consulted the Court before he allowed the juror to make the call. He could also have taken a message or relayed a message, gone to the

(Testimony of Otto F. Heine.)

'phone or had one of [11] his deputies go to the 'phone and make a call, rather than allow the juror personally to go and make the telephone call. And further, we don't have any indication as to what the conversation was. It is immaterial as far as the issue is concerned at present.

Mr. Hoddick: Your Honor, I don't think the subject matter of the conversation is immaterial.

Mr. Ahrens: At this time.

Mr. Hoddick: All the cases go to the question as to whether the conversation has some direct bearing on the case.

The Court: The point is that at this time we don't know what it was from this witness.

Mr. Hoddick: That may be, but here we have the Marshal, who has been charged with the custody of the jury, and you have the conversation with the juror and the juror telling him, "I want to make a call" for a certain purpose having no connection with the case. The question is whether the Marshal had perhaps—I don't think that that bears on whether this is grounds for a new trial or not, but the immediate question here is whether the Marshal had an implied authority to permit that juror to make a call.

Mr. Ahrens: It is the conduct we are interested in here. The conduct, we contend, is highly prejudicial. The possibilities of abuse would be so great if this practice were [12] to be extensively permitted, to allow jurors to go to the 'phone. Here the orders were specifically given by the

(Testimony of Otto F. Heine.)

Court and we contend that any variation or deviation in that conduct is prejudicial in itself. As far as the conversation of the 'phone call is concerned, Mr. Heine has testified he knows nothing about it, and at this point it is immaterial.

There is the further question that arises as to whether or not the Court is at liberty to authorize a 'phone call of a minor nature such as this.

The Court: I am going to overrule the objection. All right, go ahead.

Mr. Hoddick: Will you read the question.

The Reporter (Reading); "Q. Has it been customary before a jury retires, for purposes of deliberation, to permit members of that jury to make calls to their families and advise them that they might not be home for supper?"

A. In answer to that question, I would state it is not customary, but generally some of the jurors want to telephone their wives that they will not be home for supper and probably may be locked up. I remember a few occasions I allowed that. Then when the jury is locked up over night I would state that it was customary that the jurors, they want to get their pajamas, they telephone home; they want their wives to bring their pajamas. Some of them can't sleep. [13] without pajamas, so I let the jurors call their wives.

Mr. Ahrens: I request the last part of the answer be stricken. He testified it was not customary. It is unresponsive. The testimony speaks for itself.

(Testimony of Otto F. Heine.)

The Court: I originally sustained the objection on the ground we weren't interested in calls for pajamas and calls for purposes of saying they wouldn't be home for supper. That was my basic thought, that that was not the issue here. However, on your other point, that this answer "blows hot and cold," I agree with you, but I will let it stand and speak for itself.

Mr. Ahrens: May I note an exception for the record?

The Court: Yes.

Q. (By Mr. Hoddick): Mr. Heine, if, in the past, a juror had shown you that he found it necessary to make a telephone call to discuss something entirely apart from the case with a third party, it has been the practice, has it not, to send him in the custody of a deputy marshal and permit him to make the call?

Mr. Ahrens: Objected to as asked and answered. He testified as to the custom.

The Court: I think so.

Q. (By Mr. Hoddick): Were you standing out in the hallway, Mr. Heine, when you saw Mr. Clark make this 'phone call in the presence of Mr. Moses and your chief deputy? [14]

A. Yes. When he asked me to go to my office and telephone, I went by the door, and the other eleven jurors were in the court room. I looked out to see he went direct to my office in company with Deputy Moses, and when I looked out in the hallway, my chief deputy, Thomas Clark, was sitting



(Testimony of Otto F. Heine.)

there, too. I thought that was sufficient for them to look out what was going on.

Q. When you looked down the hallway, Mr. Heine, did you see Mr. Miho anywhere? Did you notice him?

A. Yes, I saw the two attorneys, Mr. Miho and Mr. Ahrens, standing out on my right, saw them go down.

Q. Were they looking the same direction you were? A. Apparently.

Mr. Miho: Can you say whether I saw you or not?

The Witness: That I can't tell. I know both of you were standing outside there. Whether you saw me or not, that is up to you. I don't know.

Mr. Ahrens: Were we facing you?

The Witness: You were facing me, Mr. Ahrens.

Mr. Ahrens: I was?

The Witness: Yes, sir.

Mr. Ahrens: How far away was I?

The Witness: You were about 20 feet away, I surmise.

Mr. Ahrens: Are there some pillars that might have [15] been in the way?

The Witness: I beg your pardon?

Mr. Hoddick: I am sorry, Mr. Ahrens. This is cross-examination.

Mr. Ahrens: I am sorry.

Q. (By Mr. Hoddick): Mr. Heine, have you ever at any time since you were appointed as United States Marshal for the District of Hawaii

(Testimony of Otto F. Heine.)

requested permission of the Court to permit a juror to make a telephone call of this nature?

A. I don't believe I have.

Mr. Ahrens: Objected to, your Honor, as being immaterial.

The Court: That wouldn't prove whether it was right or wrong. It relates to your point of custom, however. I think the objection is good.

Mr. Hoddick: I just want to show there is no deliberate misuse of authority.

Mr. Ahrens: I will stipulate there is no deliberate malignant misuse of authority.

Mr. Hoddick: That is all.

The Court: Mr. Ahrens.

### Redirect Examination

By Mr. Ahrens:

Q. Mr. Heine, how far away is your office from the door of the court room, how many feet?

A. Oh, I guess it is about 80 feet, probably a little more.

Q. You are sure that you saw Mr. Clark and Mr. Moses inside of your office?

A. Very positive.

The Court: Which Mr. Clark? There are two Clarks.

The Witness: Two Clarks.

The Court. Deputy Clark or Juror Clark?

Mr. Ahrens: Juror.

The Witness: The juror, yes.

(Testimony of Otto F. Heine.)

Mr. Hoddick: Objection, your Honor, on the grounds that this is his own witness.

The Court: Technically, but go ahead.

Mr. Ahrens: That is all.

The Court: Go ahead. You are not cross-examining him. You sound as if you were, but go ahead. This is redirect.

Q. (By Mr. Ahrens). Is there a counter in the office, in your office?

A. A counter in my private office?

Q. Yes. A. No, sir.

Q. No counter in your private office?

A. None whatever. There is two desks there.

Q. Are they facing the door or facing the outside? [17]

A. If I swivel my chair, my folding desk; and I turn around, my top desk.

Q. Where is the telephone, Mr. Heine?

A. On my top desk, facing the street.

Q. What was the position of Deputy Clark?

A. He was sitting on the right of my office as you go in towards the wall.

Q. How large is your office, Mr. Heine?

A. My office, I would state, is about 18 by 12.

Q. You can see, then, through the doorway the position, without too much trouble, of people there from a vantage point right outside the door; is that correct? A. Yes, with the door open.

The Court: Was the door open?

The Witness: It was.

(Testimony of Otto F. Heine.)

The Court: All of the time?

The Witness: All of the time.

Q. (By Mr. Ahrens): Did you see anybody use the telephone?

A. All of the time that afternoon.

Q. Did you see anyone use the telephone?

A. Beg pardon?

Q. Did you see anyone use the telephone?

A. No, I don't think I observed anybody use the 'phone. Probably might have been the juror. I might have saw Mr. [18] Herbert Clark. I saw somebody at the 'phone.

Q. How long was it before Mr. Moses and the juror returned to the court room

A. I should say—judge about two minutes, maybe a little longer.

Q. It might have been five minutes?

A. I doubt it.

Q. Could have been?

A. I don't think it was five minutes.

Q. Did Deputy Clarke come back?

The Court: Deputy Clarke had never been here.

The Witness: Deputy Clarke was never in the court room that day, was not in the court room that day.

Q. (By Mr. Ahrens): Did he stay in your office? You stated Mr. Clark, the juror, and Deputy Clarke, is that correct, were in your office at the time the juror made the telephone call?

A. That is correct.

(Testimony of Otto F. Heine.)

The Court: And Deputy Moses.

The Witness: And Deputy Moses, too.

Mr. Ahrens: And Deputy Moses.

Q. (By Mr. Ahrens): Did Deputy Clark leave your office, so far as you know, at any time around, before or after the 'phone call was made?

A. All that I recollect when I saw Mr.—when I watched [19] Mr. Clark go down to my office in company of Deputy Moses, my chief deputy, Thomas R. Clark, was sitting on a chair at the right, and I beleive he stayed there until the conversation was over.

Q. And you authorized Deputy Moses to allow Mr. Clark to make one 'phone call to his garage; is that correct?

A. To make one 'phone call.

Q. To make one 'phone call concerning his car at a garage? A. I did.

Q. 'Phone a garage? A. Yes, sir.

Q. That is the only call you authorized?

A. Well, he asked me—Mr. Herbert Clark asked me if he could make a 'phone call to his garage, and I said to him, "Certainly." And I instructed Deputy Emanuel Moses to accompany him to the 'phone.

Q. That is the only call you authorized?

A. That is the only 'phone call I authorized.

Mr. Ahrens: Thank you, Mr. Heine. That is all.

(Testimony of Otto F. Heine.)

Recross-Examination

By Mr. Hoddick:

Q. Mr. Heine, is it necessary for one of your deputy marshals to ask your permission, if he has been charged also with the custody of a juror, to make a 'phone call of this [20] sort or not?

A. No, they know it. I don't have to instruct them; as long as they have been sworn in court, I thought it was all right.

The Court: Mr. Heine——

The Witness: Yes, your Honor.

The Court: How did the jury happen to be in the court room, and how did you happen to be in the court room with the jury on this occasion?

The Witness: When I was sworn in, I always make it a practice, I look and see the door is locked leading into the court room.

The Court: Why? Is this the jury room?

The Witness: No, the court room.

The Court: What I am trying to have you explain is, after the Court retired to allow the jury to deliberate, how the jury happened to remain in the court room.

The Witness: In this court room?

The Court: Why weren't they up in the jury room?

The Witness: Because you gave orders they may deliberate in this court room.

The Court: All right. What were you doing in the court room?



(Testimony of Otto F. Heine.)

The Witness: I was there to see everything was O.K., to see all the jurors were present; and as soon as they [21] all got here, twelve of them, I vacated and shut the door. Moses stood watch outside and I up and down.

The Court: At the time you allowed Juror Clark to make a telephone call, had the jury settled down and were all the doors arranged and windows arranged so they could proceed to deliberate?

The Witness: No, sir, they were not.

The Court: You hadn't locked the jury up?

The Witness: I hadn't. I hadn't locked the jury up.

The Court: When did you lock the jury up?

The Witness: I locked the jury up when Mr. Herbert Clark came in. I don't lock any jury up until the twelve jurors are present.

The Court: When did you next unlock the doors of the jury room?

The Witness: I went to see you about taking the jurors to supper that evening, and I think it was about five minutes of six when I knocked at the door, and one of the jurors came out, and I asked him if they wanted to go to lunch. He said they would like to take another ballot, and that ballot, I think, took a little while, maybe a few minutes after six when they again knocked at the door and said they had arrived at a verdict.

The Court: Other than those two instances of communication between you and the jury, after the

(Testimony of Otto F. Heine.)

time they were locked up, did any juror leave the court room, which was serving as the jury room?

The Witness: Not one of them.

The Court: Did anyone communicate with any one of the jurors after they were locked up, other than as you have outlined?

The Witness: No, sir.

The Court: All right. Based on my questions, you each can ask questions.

### Redirect Examination

By Mr. Ahrens:

Q. Didn't you talk to some of the jurors before Mr. Clark returned, before they were locked up, just before they settled down, while you were in the room here?

A. I talked to some of the jurors. I just asked them—I told them where the toilet was, they could wash their hands and things like that, which they didn't know anything about. I had to tell them where to go in case they wanted to go to the toilet or wash their hands. I didn't speak to them anything pertaining to the case whatsoever.

Q. What else did you talk to them about before they settled down, Mr. Heine?

A. I told you what I talked to them.

Q. Could you be more specific [23]

A. I could be more specific by telling you where the toilet was.

The Court: Where is it, incidently?

(Testimony of Otto F. Heine.)

The Witness: Right over here (indicating).

The Court: In other words, when we use this court room as a jury room, due to the deplorable condition of the jury room, the Court makes its private lavatory available to the jury and you lock the door into my chambers?

The Witness: The Court makes his private toilet available to the jurors, and I locked the door to the Judge's Chambers from the court room. The key is in my possession.

Q. (By Mr. Ahrens): While Mr. Clark was out making this 'phone call and before the jurors had settled down, you were still here in the room part of the time, weren't you? A. I was.

Q. What was your answer again?

A. Beg pardon?

Q. What was the answer to that last question?

A. I was. I was here for the purpose—I explained I was here for the purpose of allowing——

Q. You have explained that.

A. (Continuing): ——no one to come in and talk to the jurors, the eleven jurors.

The Court: Any further questions?

Q. (By Mr. Ahrens): Then when did you leave the jury [24] room? You were in and out?

A. As soon as the jury was ready to deliberate, I told them anything they wanted to knock at the door and I would answer it, if they wanted any information.

Q. That was after Mr. Clark came back?

A. That was.

(Testimony of Otto F. Heine.)

Q. And then you went out of the jury room and locked them in? A. I did.

The Court: Where was Mr. Moses?

The Witness: Mr. Moses was outside. He went out with me, rather.

Q. (By Mr. Ahrens): Did Moses come into the jury room with Clark after he came back from the 'phone call? A. He did.

Q. Did he talk to anybody at that time?

A. Not to my recollection.

Q. Was he talking to Mr. Clark as he walked into the jury room?

A. I don't know. I was too far away. I was over here at the time (indicating).

Q. You were over here (indicating)?

A. Over on my left.

Q. What were you doing when you were over there? When Mr. Clark and Mr. Moses came in, you were here; what [25] were you doing at that particular time? A. I was standing there.

Q. Where was the rest of the jury?

A. They were standing around.

Q. Talking?

A. Well, talking, I guess. I don't know what they were talking about. It had nothing to do with me what they were talking about.

Q. Did Mr. Clark, the juror, talk to or ask any questions of any of the jurors while you were in the room? A. He did not.

Q. Did any of the jurors ask you any questions

(Testimony of Otto F. Heine.)

or talk to you, approach you, other than Mr. Clark?

A. About what?

Q. Anything. Discuss the weather maybe.

A. They did not.

Q. None of them approached you at any time before the 'phone call——

Mr. Ahrens: Withdraw that question.

The Court: Wait a minute. The only basis in your motion is this 'phone call. Let's not waste a lot of time going into other things that you are not charging as error. The whole basis of the motion on this point is the 'phone call; unless you are testing the credibility.

Mr. Ahrens: No. Later on, if it develops, your Honor, I would like to amend our motion.

The Court: I am not going to allow this to develop into a searching expedition. You have had two days to talk to Mr. Heine. I told you to talk to him the other day.

Mr. Ahrens: All right, your Honor. I am sorry. Mr. Heine, thank you; that is all.

The Witness: Thank you.

(Witness excused.)

The Court: All right, next witness. You can still talk to him and if you find something wrong, come back, but let's get this matter in hand attended to.

## EMANUEL MOSES, JR.

called as a witness by the attorney for Defendant, being first duly sworn, was examined and testified as follows:

The Court: You are Emanuel Moses, Jr.

The Witness: Yes, sir.

The Court: You are Deputy United States Marshal?

The Witness: Yes, sir.

The Court: How old are you?

The Witness: Forty-one.

The Court: And you reside here in Honolulu?

The Witness: Yes.

The Court: You are a citizen of the United States exclusively?

The Witness: Yes, sir. [27]

The Court: Take the witness.

## Direct Examination

By Mr. Ahrens:

Q. Mr. Moses, on Decemer 14 of this year were you instructed by the Court in Criminal No. 10,256 to take charge of the jury during their deliberation?

A. I was.

Q. Was anybody else also authorized or co-authorized to so take care of the jury?

A. Marshal Heine, Otto Heine.

Q. And what were your instructions from the Court as to your conduct with the jury and conduct with outsiders?



(Testimony of Emanuel Moses, Jr.)

A. Not to let them converse with anybody except to the Marshal and myself.

Q. Were you told not to allow anyone else to converse with them?      A. Yes.

Q. When you and Mr. Heine were in the process of clearing the court room, did you have occasion to speak to any juror or did any juror have occasion to speak to you?      A. No, sir.

Q. When the court room was completely cleared, did Marshal Heine give you any instructions?

A. I was having the table, two tables set together and moving some chairs when he called me and told me to take this [28] juror to the office, he wanted to call his garage in regard to his car.

Q. At that time was everybody out of this room except the jury, you and Mr. Heine?

A. Yes, everybody out of the court room except the jurors and Mr. Heine and myself.

Q. Where was Mr. Heine about the time he called you?

A. Mr. Heine was about here somewheres (indicating).

Q. And you were moving these two tables?

A. Yes, I was way down at that corner there.

Q. You were at the end?      A. Yes.

Q. Was Mr. Heine talking to any of the jurors?      A. That I wouldn't know.

Q. When Mr. Heine called you over, who was there besides Mr. Heine?

A. When he called me, he was about here (indi-

(Testimony of Emanuel Moses, Jr.)

cating) and I was there (indicating). He just called me to take this juror to the office to use the 'phone.

Q. Who was there besides Mr. Heine? Was Mr. Clark there, the juror?

A. Must have been. He pointed to a juror there, said, "Take this juror to the office."

Q. He pointed to Mr. Clark? A. Yes. [29]

Q. Where were the rest of the jurors?

A. They were all moving around, taking their coats off. Some of them were helping with chairs, too.

Q. They were fairly close to where Mr. Heine and Mr. Clark were?

A. They were all around. I couldn't say how close they were.

Q. They were helping both you and Mr. Heine set up the room for their deliberations?

A. Yes.

Q. There was occasional talk going on at the time among yourselves and the jurors?

A. Not myself. Maybe among the jurors.

Q. Oh, I see. What were your specific—

Mr. Ahrens: Withdraw that.

Q. (By Mr. Ahrens): Did you overhear any particular conversation between anybody in the jury room? A. No.

What were your instructions from Mr. Heine after he called you over? Will you give them to us as exactly as you can rememer.

(Testimony of Emanuel Moses, Jr.)

A. I just remember he pointed to a juror there and said, "Take this juror. I want him to use the office—to our office to use the 'phone.'"

Q. He said, "Take him to the office"? [30]

A. Yes, our office.

Q. "He wants to use the 'phone.'"

A. Yes, to call the garage in regard to his car.

Q. He did mention something about a car?

A. Something about that.

Q. You didn't hear the actual conversation between Mr. Clark and Mr. Heine?

A. No. No, I did not.

Q. Do you know who he was supposed to call or who he wanted to call?

A. Well, he just mentioned about the car, the garage and car. That is about all.

Q. You didn't know what the name of the garage was? A. No, I did not?

Q. Did Mr. Heine say anything more?

A. No.

Q. He did not mention allowing you or authorizing you to let Mr. Clark make any other calls?

A. No.

Q. You accompanied Mr. Clark out of the court room then; is that correct? A. Yes, sir.

Q. Was anybody else present? A. No, sir.

Q. Just the two of you? [31]

A. Just the two of us.

Q. Where did you go?

A. Went directly to the office.

(Testimony of Emanuel Moses, Jr.)

Q. Did you talk on the way? A. No, sir.

Q. What happened—Who was there when you got to the office?

A. Our chief deputy, Mr. Clark.

Q. Did you talk to him? A. No.

Q. Did Juror Clark talk to Deputy Clark?

A. No, not that I know of.

Q. At any time?

A. He talked after he used the 'phone.

Q. What happened when you got to the office? There were three of you then and what happened?

A. Mr. Clark got on the 'phone.

Q. He didn't talk to anybody?

A. No, he went to the 'phone and called the number he was calling.

Q. Called some number?

A. Must have been the garage because he was talking about a car. He said he couldn't get there in time for his car, it would be closed, so the proprietor or somebody would bring the car to the Federal Building. [32]

Q. You heard him say that? A. Yes.

Q. You don't know who he called?

A. No, I don't know.

Q. You just heard part of the conversation, not the complete conversation.

A. Well, mostly what Mr. Clark was saying over the 'phone.

Q. No, I mean, were you talking to Deputy Clark while Juror Clark was 'phoning?

(Testimony of Emanuel Moses, Jr.)

A. No, I was not talking.

Q. Not at all?           A. No.

Q. How far away were you from Mr. Clark at the time he made this 'phone call?

A. About two feet, two and a half feet, right back of him.

Q. Standing?   Sitting?           A. Standing.

Q. Where was Deputy Clark?

A. Sitting on the side of the 'phone.

Q. Sitting on the side. You didn't authorize Mr. Clark to make any other 'phone call, did you?

A. No, sir.

Q. Did he make any other call? [33]

A. He did.

Q. How many?           A. One.

Q. To whom?           A. To his home.

Q. Was there an answer?

A. Got an answer from a child or somebody in the home.

Q. Do you know whom he got an answer from?

A. I know he did.

Q. Of your own knowledge?           A. Yes.

Q. How do you know that?

A. Well, somebody answered the 'phone and he asked for Mother, and the child, or somebody—the mother was way in the back, and he said, "Tell Mother I won't be home early this evening."

Q. What you heard is that Juror Clark said, "Tell Mother I won't be home early"?

A. Yes.

(Testimony of Emanuel Moses, Jr.)

Q. That might have been Mr. Clark's mother that he was referring to, you don't know?

A. Well, I couldn't say. I had the impression it was his wife.

The Court: More than likely his wife.

Q. (By Mr. Ahrens): What else did Mr. Clark say? [34]

A. That is about all. A child on the 'phone anyway.

Q. But he said a little more?

A. He might have. I couldn't recall.

Q. Did Deputy Clark authorize any 'phone calls that you know of? A. No.

Q. What were you doing when Juror Clark finished his first 'phone call?

A. Standing right back of him.

Q. What was Deputy Clark doing?

A. Sitting right alongside of him.

Q. Did you talk to him after he finished his first 'phone call? A. No, sir.

Q. Were you going to take him directly back?

A. Just as soon as he finished his first call, he grabbed the 'phone and said, "I think I better call my home."

Q. Your instructions from Mr. Heine were to allow him to make one call to a garage; is that right? A. Yes.

Q. So you knew you should have taken him back to this room immediately after that call; is that right? A. Yes.



(Testimony of Emanuel Moses, Jr.)

Q. And actually you didn't do that?

A. Well, before I had a change to move, he dialed the [35] 'phone again.

Q. You didn't try to stop him?

A. I told him—when he dialed home, I told him to make it snappy, the only thing I told him.

Mr. Ahrens: That is all. Thank you.

The Court: Cross-examination.

Cross-Examination

By Mr. Hoddick:

Q. On either of these telephone conversations did you hear Mr. Clark say anything pertaining to the subject matter of this case?

A. No, sir.

Mr. Hoddick: No further questions.

Mr. Ahrens: But there were some parts of the conversation that you might have missed?

The Witness: I might have.

Mr. Ahrens: That is all.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Ahrens. Mr. Clark, please.

## THOMAS R. CLARK

called as a witness by attorney for the Defendant, being first duly sworn, was examined and testified as follows:

The Court. You are Thomas R. Clark? [36]

The Witness: Yes, I am.

The Court: "R" is the middle initial?

The Witness: That's right.

The Court: You are Chief Deputy United States Marshal for this district?

The Witness: Yes, sir.

The Court: Your age is?

The Witness: Fifty.

The Court: You are a resident of Honolulu?

The Witness: Yes, I am.

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively?

The Witness: Yes, sir.

## Direct Examination

By Mr. Ahrens:

Q. Mr. Clark, do you recall where you were on December 14, 1949, at about 4:20?

A. The date I am not sure of, but I think it is that date, December 14, 19—I think it was Wednesday. Yes.

Q. Where were you?

A. I was in Mr. Heine's office. That is Room 304, on the south end of the Federal Building.

(Testimony of Thomas R. Clark.)

Q. That was the day this year that the Jury was deliberating on Criminal Case No. 10,256? [37]

A. Yes, that is right, if that was the 14th.

Q. You were in Mr. Heine's office?

A. That is right.

Q. What were you doing in Mr. Heine's office?

A. Well, it was getting near quitting time, and I didn't know whether I should go or wait for orders from Mr. Heine. That's why I went to his office. I think it was getting around 4:30 p.m.

Q. 4:30. Were you sitting, standing, working; just what were you doing, more or less waiting for instructions?

A. That is right. I was just sitting in Mr. Heine's office.

Q. In Mr. Heine's office?

A. That's right.

Q. Where in the office were you, Mr. Clark?

A. In the south end of the Federal Building here, Room 304.

Q. What I mean, Mr. Clark, I am sorry, is, at what desk or what chair in the room were you sitting?

A. Well, we will say on a chair facing north, right out of Mr. Heine's room where the whole corridor is visible to me.

Q. So you could see straight down the corridor?

A. That's right.

Q. What did you observe, if anything, when you looked [38] down the corridor about that time?

A. Well, the first thing that attracted my at-

(Testimony of Thomas R. Clark.)

tention was when Deputy Moses came into the room with someone.

Q. He came right into the room; that is the first time you noticed Deputy Moses?

A. That's right.

Q. Who was he with?

A. Well, at the time I did not know who it was.

Q. Do you know who it was now?

A. I have heard he was a juror.

Q. Do you know his name?

A. Yes, his name was Clark, like mine. I remembered that.

The Court: Any relation?

The Witness: No, none whatever.

Q. (By Mr. Ahrens): What happened when Mr. Moses came in the door? He came in first, you said?

A. I think he did, followed by Deputy Moses, yes.

Q. Followed right after by Mr. Moses?

A. Yes.

Q. Did Mr. Moses say anything to you when he walked in the door?

A. No, I don't think he said anything, but they proceeded right to the telephone and the juror began dialing a number. [39]

Q. What were they talking about as they entered the door?

A. What were they talking about as they entered the door?

(Testimony of Thomas R. Clark.)

Q. Mr. Clark and Mr. Moses. What were they talking about as they entered the door?

A. I do not know. I think they were conversing, but I couldn't say; I haven't the slightest idea what they were talking about.

Q. Mr. Moses went directly to the 'phone?

A. No, I think the juror did. In fact, I know the juror did.

Q. What did Mr. Moses do? Where did he go?

A. Just stood on another desk, facing me.

Q. I see. So when Mr. Clark passed you, did he say anything to you on his way to the telephone?

A. No, he just proceeded to dial a number.

Q. Directly to the 'phone and dialed a number?

A. That's right.

Q. Did anybody tell him how to use the telephone? A. No.

Q. No conversation? A. No.

Q. Do you have to dial—Can you dial your number right away or do you have to dial the operator first? [40]

A. You dial a zero out of that office and you get Bell Telephone and you dial your number.

Q. There was no mention made of how to operate the telephone?

A. I don't know. I couldn't say. I do not remember.

Q. Do you recall if he had difficulty getting his number, or did he get it right away? Did he know how to use the 'phone? He didn't have any trouble?

(Testimony of Thomas R. Clark.)

A. I don't know that. I don't recall that, whether he had difficulty getting the number or not. I don't know.

Q. How long would you say it took him to start talking on the 'phone after you first heard him start clicking the little dial?

A. Right away I think.

Q. Right away? A. Yes.

Q. It was a normal 'phone call?

A. Yes, yes, that is right.

Q. There was no trouble?

A. Apparently not.

Q. It went through right away. Did you hear Mr. Clark say anything over the telephone?

A. Part of the conversation I did hear, yes.

Q. You heard part of it. You heard part of what Mr. Clark said? [41]

A. Yes, the discussion over the telephone was primarily over the key of his automobile.

Q. A key? A. The key.

Q. Do you know who he called?

A. No, I don't.

Q. He didn't mention anybody by name on the telephone? He didn't say "Joe"?

A. If he did, I don't recall.

Q. He mentioned something about a key. What else did he mention that you know of?

A. The conversation was about to bring his car up first, and apparently the one on the other end said they can do that there.

Q. You are just guessing; you don't know what



(Testimony of Thomas R. Clark.)

the person on the other end said; you didn't hear?

A. No, I can't. No, I did not hear that.

Q. Just tell us what you know.

A. Then the conversation drifted into where they should put this key, whether on the floor board or some place on the car so he could find it later.

Q. They were pre-arranging a place to put the key?

A. On this car, yes.

Q. I see. A. That's right. [42]

Q. What was Mr. Clark's reason, or did you hear him give a reason, to whoever he was talking to, for not getting the car?

A. No, I don't recall him saying—giving the other person his reason for not getting the car. If he did give, I don't think I——

Q. You didn't hear it. There was part of the conversation, as you stated before, you didn't hear?

A. Part of it, yes, because I didn't want to be butting in and listening to other people's conversations.

Q. I am referring to what Mr. Clark himself said.

A. That's right.

Q. Did you at any time leave the room while Mr. Clark was 'phoning?

A. No, I did not.

Q. Did you hear Mr. Clark mention anything——

Mr. Ahrens: Withdraw that question.

A. I know——

The Court: Wait a minute. There is no question.

(Testimony of Thomas R. Clark.)

Q. (By Mr. Ahrens): Didn't you hear Mr. Clark mention something to the effect that he was going to be locked up in the jury room?

A. If he did, I did not hear him say.

Q. About how long did this 'phone call last?

A. Three minutes, four minutes, perhaps. [43]

Q. Three or four or five minutes, maybe seven?

A. Seven minutes is an awful long time. I don't think——

Q. Probably closer to five, you would say?

A. Yes.

Q. But it was a long conversation?

A. He put in another call, too.

Q. No, just answer my question. This first 'phone call I am talking about; it was a fairly long conversation?

A. I don't know whether I would say it was a very long conversation.

Q. I say fairly long.

A. Yes, we will say fairly long.

Q. It was not curt, short? A. No.

Q. Rather informal? A. Yes.

The Court: What is a formal telephone call? Go ahead.

Q. (By Mr. Ahrens): When he got through making his 'phone call, where were you?

A. I was sitting right at the desk where I sat when he first come in.

Q. Where was Mr. Moses?

A. He was at another desk nearer the door facing me [44] and Mr. Clark who was telephoning.

(Testimony of Thomas R. Clark.)

Q. Did anybody say anything then, right after he hung up the 'phone? Did you say anything?

A. I don't know. I don't recall.

Q. You might have, though?

A. I might have done. I don't recall.

Q. Or were you talking to Moses?

A. No, I was not talking to Moses. I was really reading a magazine.

Q. And Moses was how many feet away from Mr. Clark?        A. Four feet.

Q. At the time he finished his call?

A. About the width of a desk, oh, four feet.

Q. Four feet. What did Moses do after Mr. Clark put down the 'phone the first time, after completing his call? Did he do anything or just stay there?

A. No, Mr. Clark started dialing another number. He was still at the telephone.

Q. Oh, I see. Did you try to stop Mr. Clark?

A. Did he what?

Q. Did you try to stop Mr. Clark from making a 'phone call?        A. No.

Q. Did Mr. Moses try to stop Mr. Clark from making the 'phone call? [45]

A. I don't think so.

Q. Did you hear Mr. Moses say anything to Mr. Clark when he started to dial the number or after he had dialed it?

A. After he had dialed the second number, someone from the hallway, which the view was

(Testimony of Thomas R. Clark.)

obstructed, I think hollered, "Come on in," or something to that effect.

Q. Somebody down the hall?

A. Either that or come up to the door and said, "You are wanted," or something to that effect.

Q. Said who was wanted? A. The juror.

Q. This person was talking to the juror as he was on the 'phone?

A. No, talked to Moses.

Q. Talked to Moses?

A. Whether it was Mr. Heine himself I couldn't say. Mr. Clark was on the telephone.

Q. Was he making the second call?

A. He had dialed the second call and waiting for an answer. Then they had to leave and Mr. Clark handed the telephone over to me and said, "Will you answer this telephone?" And I said, "Well, who will I be talking to?"

Q. Go ahead.

A. And then he said, "Mrs. Clark will be answering the telephone." He said, "Mrs. Clark, and just tell her that I [46] will be late." And they rushed off, and finally I picked up the telephone,—well, he handed it to me—and waited until some female voice answered on the other end and asked if it was Mr. Clark. And I told her who I was. It was the United States Marshal's office, and informed her, "Mr. Clark will be late."

Q. What else did you tell her?

A. She said something about, "Well, when he

(Testimony of Thomas R. Clark.)

is through, he can find me at the Church choir," or something like that, that she was going to choir practice, and that is where she would be.

Q. Did you convey that message to Mr. Moses or Heine or somebody?      A. No.

Q. Mr. Clark learned what his wife said, didn't he?

A. Right after I hung up the telephone I wrote a little note to Mr. Clark to tell him Mrs. Clark will be at choir practice, he will find her there, something to that effect. And I delivered it—I am pretty sure I gave it to Mr. Moses himself to hand to the juror.

Q. What else did you say to Mrs. Clark when you talked to her over the 'phone, anything that you haven't mentioned to us?

A. No, I don't think, other than what I just said.

Q. Mr. Clark did talk to someone at that number before [47] he handed you the 'phone, or did he not? Did he or didn't he?

A. I don't think he had a chance to talk to anyone, because he had dialed and he was waiting for someone, so he handed it over to me and I did the waiting, and pretty soon a voice answered. Because I asked him who would I be talking to when he handed the telephone over to me, and he said, "Mrs. Clark."

Q. You don't recall his talking to anybody on the telephone the second time? He might not have

(Testimony of Thomas R. Clark.)

been talking to Mrs. Clark, but he might have been talking to somebody else, maybe his daughter, perhaps, or somebody else?

A. No, I don't think—he dialed and pretty soon he had to leave right now, and he handed the telephone over to me. I don't know whether he talked to anyone before Mrs. Clark——

Q. But he might have?

A. Well, I guess he might have. I don't know.

Q. Do you recall the conversation when that person whom you don't know came to the door and said to get going to the jury? What transpired? Somebody came and what happened? They wanted the juror, you said?

A. Yes, and Moses just——

Q. What, exactly, was done or said? You were right there.

A. Well, the person who brought the message I couldn't say, because his view was obstructed. I am sitting down and [48] Mr. Clark and Moses would be in the way towards the door. Who brought the message I couldn't say. I don't know.

Q. But it wasn't anybody from your office staff, because they were all there?

A. That I do not know, but someone. That's why Mr. Moses said, "Come on, let's go." They had to leave, and the man handed the telephone over to me.

Q. But the only people from your staff on duty that day were you, Mr. Heine, and Mr. Moses?

A. That is right.



(Testimony of Thomas R. Clark.)

Q. And did you state you knew where Mr. Heine was? Did you see him down the hall?

A. I know he was up the corridor here, this way. I knew that.

Q. I see. So the man who hollered, or did whatever was done, was not Mr. Heine?

A. That I do not know. I didn't see.

Q. Well, you would have recognized Mr. Heine's voice had it been Mr. Heine?

A. Sure, I am familiar with his voice.

Q. And if it was Mr. Heine, you would have recognized his voice, being familiar with it?

A. Well, that is possible, I could have recognized it.

Q. But you didn't recognize this voice?

A. No, I did not. [49]

Q. Can't you give us a little more detail on the exact words or actions that this person went through? You said you heard something, but there was a man in the way; you couldn't see who it was, so he must have talked then.

A. No, I couldn't see the man. I don't know who it was.

Q. Well, see if you can't remember what he said.

A. No, I don't. I don't remember. The thing that attracted my attention was Moses grabbed the juror and said, "Come on, let's go."

Q. He was not talking directly to Mr. Clark, then, if you don't recall?

A. I don't think he was talking to Mr. Clark.

Q. But he might have been?

(Testimony of Thomas R. Clark.)

A. No, I would say more likely he was talking to Moses.

Mr. Ahrens: That is all. Thank you.

Mr. Hoddick: No questions.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Ahrens: That is all.

The Court: Aren't you going to call Juror Clark.

Mr. Ahrens: No, your Honor, we are not.

The Court: Why? He is the one who made the 'phone [50] call.

Mr. Ahrens: Well, it is our contention that what actually transpired, although it is pertinent, it is no necessary that we go into it at this time, inasmuch as when something irregular, something of this nature, goes on, it is sufficient to show that there was an irregularity, an opportunity to discuss the case or anything of that nature. Then the Government, if it desires, can come in and bring Mr. Clark and show what the telephone call was all about.

The Court: But you are the one who is trying to prove something prejudicial happened. But you don't have to call him. I just expected he would be the final witness.

Mr. Ahrens: We will show he made a call.

The Court: All right, let's get going. We have spent two hours on this now. I am getting a little bit impatient. How much more have you got?

Mr. Hoddick: Your Honor, before he proceeds,

I would like to ask Mr. Moses one question I overlooked on cross-examination.

The Court. It is ten minutes past twelve. I will stop now and have Mr. Clark, the juror called to be here at 1:30 this afternoon. If nobody else will call him, I will call him, and at that time you can ask Mr. Moses an additional question.

We will take our noon recess until 1:30.

(Thereupon a recess was taken until 1:30 of the same day.)

\* \* \*

#### Afternoon Session

The Court: Mr. Ahrens, at the noon recess I directed that Juror Clark be produced. I see he is now in court. There seems to be some confusion in the minds of some as to whether or not the Court should, or should not call him as a juror. I will refrain from calling him at this time. I will cause both of you to take notice that he is present. If neither of you call him, I will call him then.

Mr. Clark, will you step to the Marshal's office and make yourself comfortable until you are called.

Mr. Hoddick: Will you ask Mr. Moses to come down.

(Exit Mr. Clark.)

The Court: While we are waiting for that, will you come up with that book.

(Court and Counsel confer.)

## EMANUEL MOSES, JR.

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

The Court: Do you want a moment to talk to Mr. Miho?

Mr. Ahrens: Please.

(Counsel confer.)

The Court: Mr. Hoddick, as I recall, has recalled Mr. Moses for one or two questions. [52]

Mr. Hoddick: That is correct.

The Court: All right, you may cross-examine further.

Cross-Examination  
(Continued)

By Mr. Hoddick:

Q. Mr. Moses, when you walked out of the court room with Mr. Herbert Clark for the purpose of having him make a telephone call in Mr. Heine's office, did you see Mr. Miho in the hallway?

A. No.

Q. You did not? A. No.

Q. When you were in Mr. Heine's office and Mr. Clark was making a telephone call, do you remember seeing Mr. Miho? A. No.

Mr. Hoddick: No further questions.

Mr. Miho: I didn't know I was on trial, if your Honor please.

Mr. Ahrens: No questions.

The Court: Do you have any additional witnesses?

Mr. Ahrens: No additional witnesses, your Honor. We would like to continue the argument, however.

The Court: Let's finish up this point.

Mr. Hoddick: Your Honor, I would like to call Mr. Clark to take the stand. [53]

HERBERT A. CLARK

called as a witness by attorney for the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name.

The Witness: Herbert A. Clark.

The Court: Age?

The Witness: Thirty-three.

The Court: Residence?

The Witness: Honolulu.

The Court: Occupation?

The Witness: Salesman.

The Court: Employed by?

The Witness: Ault Supply Company.

The Court: Citizenship?

The Witness: United States.

The Court: United States exclusively?

The Witness: Yes, sir.

The Court: Before we proceed further, let me advise you that, having been one of the twelve jurors who sat on the trial of this case, you are going to be asked some questions by the attorneys. Under no circumstances will I allow you to testify

(Testimony of Herbert A. Clark.)

to anything that occurred in the jury room after the jury was locked up and started its deliberations upon the verdict which was returned. Is that clear?

The Witness: Yes, sir.

The Court: All right. [54]

### Direct Examination

By Mr. Hoddick:

Q. Mr. Clark, were you a member of the jury in the case of United States vs. Orestus Cavness?

A. Yes, sir.

Q. And after Counsel had finished their arguments, after the jury had received its instructions from the Judge, did you have occasion to make any telephone calls? A. Yes, sir.

Q. Will you describe to the Court and to me under what circumstances those calls were made, whom you called and what was said.

A. Yes, sir.

The Court: Let's first find out whether that which you are asking him about did or did not occur before or after the jury settled down and was locked up and started its deliberations.

Q. (By Mr. Hoddick): Were these telephone calls made, Mr. Clark, before or after the jury had started to deliberate about this case?

A. Before.

Q. There had been no steps taken to procure the help of a foreman before you made the telephone calls?



(Testimony of Herbert A. Clark.)

A. No steps were taken.

Q. Now, describe under what circumstances those calls [55] were made.

The Witness: May I?

The Court: Yes.

A. Not knowing how long we would be in deliberation, not having gone through this sort of thing before, I thought it would be necessary to call the Auto Service Garage where my car was parked throughout the day to ask the attendant on duty to lock my car and either bring the keys over to me or put them in a safe place where I might get them after I was through with what I was responsible for, in order that I wouldn't lose any articles that were in my car that were valuable to me.

Q. Do you know who it was you spoke to at Auto Service Garage?      A. Yes, I do.

The Court: Let's start at the beginning. How did he ever get to speak to anybody at the Auto Service Garage?

Mr. Hoddick: Withdraw that last question.

Q. (By Mr. Hoddick): After making up your mind that you should call the garage to arrange for your car, what steps did you take in order to make that call?

A. When it first came to my mind that I should make the call, I believe I asked Mr. Parish, another juror, if it would be permissible for me to make a call, knowing that he had served on juries at other

(Testimony of Herbert A. Clark.)

times. And he said he thought [56] so, he was not sure. Then I spoke to the gentleman over here in the gray coat.

The Court: Peter, the bailiff.

The Witness: Yes. I asked him if some arrangements could be made where my car could be locked that was at Auto Service Garage and the keys brought to me, knowing that I could not leave; or what I could do about the same. And he said he would find out, and then I never spoke to him again about it.

The next time I brought it up was when Judge McLaughlin ordered us to come into deliberation. Is that the term? And knowing that we weren't supposed to talk to anyone, I didn't know whether to ask Marshal Heine whether I could make a 'phone call or not, but I did, and he was the next man I asked if I could make a 'phone call. And at the same time Mr. Parish asked if he could make a 'phone call, and then he decided not to make a 'phone call.

I was authorized to go to the Marshal's office and make my 'phone call, being accompanied by a Hawaiian gentleman, I don't know his name; I believe he is in the Marshal's office. And on the way down the hall he didn't say a word to me. I just mentioned that I wanted to call the garage and make arrangements for my car to be locked up, and also to call my wife, as I had an appointment to go to choir practice in our Church choir that

(Testimony of Herbert A. Clark.)

same evening, and not [57] knowing whether I could make that, I had to make other arrangements for her to get transportation to the Church.

I went in. I tried the Auto Service number three to four times.

Mr. Hoddick: Excuse me. One question.

Q. (By Mr. Hoddick): When you asked Mr. Piena, who was sitting over at the desk here, the bailiff——

The Court: Peter.

Mr. Hoddick: Peter.

The Court: I can never remember his last name. Piena, is it?

Mr. Hoddick: Piena.

Q. (By Mr. Hoddick): You asked Peter Piena whether it was right to make the telephone call; how long was that, if you remember, before you asked Marshal Heine whether you could make the call?

A. Oh, just a matter of a few minutes. It was when we were asked to step out before we were brought back into this court room.

Q. You asked him when you were told to step out? A. Yes, sir.

Q. That is when you asked Peter?

A. Yes.

Q. And you asked Mr. Heine after you came back in?

A. After we received orders to go into deliberation. [58]

(Testimony of Herbert A. Clark.)

Q. Mr. Clark, I point out to you the gentleman who has stood up there, being Moses, the United States Deputy Marshal——

Mr. Ahrens: Objection.

Q. (Continuing): And ask you if he is the man who took you down to Marshal Heine's office.

The Court: What is the nature of your objection?

Q. (Continuing): Is that the man?

A. Yes, that is the man.

Mr. Ahrens: He just told him that is the man. All he had to ask him was to identify him.

The Court: True, that is all he has to ask him, but the fact that he is the Deputy Marshal doesn't mean that is the one.

Mr. Ahrens: The witness has stated he thought the man who took him was the United States Deputy Marshal.

The Court: Overruled.

The Witness: He is the man.

The Court: He is the man. He has already testified he was the man anyhow.

The Witness: He is the man that wouldn't talk to me.

Q. (By Mr. Hoddick): You said you were walking up to the office and you were explaining to Mr. Moses about the call to the garage and the call home about the Church choir practice? [59]

A. Yes.

Q. But that he did not say anything to you?

(Testimony of Herbert A. Clark.)

A. No, he didn't.

Q. Now, will you go on. What took place right after that?

A. I sat down to make my 'phone call. He sat down in the chair opposite me, and I tried several times, not being able to get my number at the Auto Service Garage. Finally, I did make contact with Mr. Kim, who is in charge of the Auto Service operation over there—I guess he is called and termed the service station manager—came onto the 'phone, and I told him that I was still on jury duty, as I had left my car there for the days previous to this time, and he had known I was a member of the jury, and that I was tied up and I couldn't pick my car up, and I would appreciate him locking it for me and arranging to bring the keys over to me or putting them in a safe place, and he didn't want to bring the keys over to me, so he was trying to think of several different ways of locking my car and putting the keys somewhere where no one else could find them, and I could find them as readily as when I went to pick up my car. And the whole gist of the conversation was just that. I didn't tell him what I was doing, except that I was still on jury duty, and I would appreciate him locking my car, and he didn't ask me any questions. And finally he decided to lock my car and place [60] my car keys—Do you want to know where he placed them?

Q. Go ahead.

A. He placed them under the clock on the ledge

(Testimony of Herbert A. Clark.)

above the door, under the clock right above the door on top of the gas stick that he uses to measure the gas. And I thanked him very much and hung up. And I tried to call my wife, and to no avail. The 'phone was busy, and someone stuck their head out of the door and was trying to get me back up here. They were getting a little bit impatient. I was down there, to everybody's knowledge, too long. So I was getting a little nervous myself. So I asked the man Moses, I think that is his name, if he would be able to relay a message for me to my wife, and he said he would, so I gave him the number of my home, 70928, and my wife's name, and asked him to tell her that I would not be able to make choir practice and to make her own arrangements to go to choir practice herself. I did not talk to my wife at all. I didn't get my number. And I immediately left the Marshal's office and ran up to the court room. That is all.

Q. When you left the Marshal's office, had you succeeded in talking to anybody at your house?

A. No, sir.

Q. Did you give the 'phone to anybody when you went out of the Marshal's office?

A. Moses, the Hawaiian gentleman that you termed as the [61] deputy.

Q. Did anybody walk with you from the Marshal's office back to the court room?

A. Yes, someone did. I would like to retract that statement. There was another gentleman I



(Testimony of Herbert A. Clark.)

gave the 'phone number to that was sitting in the Marshal's office. I didn't give it to Moses, I am sorry. I made the wrong statement, if that is permissible.

Q. Was the other gentleman also a Hawaiian?

A. Yes.

Q. And you asked him to deliver this message?

A. Yes. Then Moses walked back with me. That is how it was. It was another Hawaiian gentleman that was sitting in the office that I asked to relay the message to my wife for me.

Q. When you asked this other Hawaiian gentleman in the office to relay the message to your wife, did you say anything to him about the subject matter of the case that was being tried here?

A. No, sir.

Q. Did he say anything to you about it?

A. No, sir.

Q. And neither you nor Mr. Kim discussed the subject matter of this case?

A. No, sir. I was merely interested in the protection [62] of my things in my car and just getting my family problem worked out as far as going to Church.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

(Testimony of Herbert A. Clark.)

Cross-Examination

By Mr. Ahrens:

Q. Mr. Clark, you mentioned that when the Court asked you to step out of the room prior to being informed that you were about to deliberate, you were wondering about a 'phone call; is that correct? A. Yes.

Q. Whom did you talk to in the corridor about making the 'phone call?

A. Peter, and I think Mr. Parish, the other jury member, it seemed he wanted to make a 'phone call, too, about his car that was in Miller & Wassman.

Q. His car was in Miller & Wassman?

A. Miller & Wassman.

Q. How did that conversation come about? Did you start it or did Mr. Parish start it?

A. I believe I started it.

Q. And you talked first to whom, if you recall?

A. I don't recall. There was just something on my mind that I thought I had better take care of.

Q. You wanted to make a 'phone call? [63]

A. Yes.

Q. Do you remember what Mr. Parish advised you? The reason you said you approached him was because you said you knew he had served on a jury before.

A. From his other statements before, yes, I had known that he was——

Q. What other questions?

A. Well, when he was questioned by Mr. Miho.

(Testimony of Herbert A. Clark.)

The Court: Hoddick.

The Witness: Mr. Hoddick, when we were being processed.

Q. (By Mr. Ahrens): Did you know Mr. Parish prior to the time that you sat on the jury?

A. Oh, yes.

Q. Are you a good friend of Mr. Parish's?

A. Oh, I have known him for a good many years. I don't associate with him personally. I know him as an employee of the Bishop Bank.

Q. Did you know that Mr. Parish was a member of the police reserve organization?

A. I didn't know that until I think he mentioned it in just natural conversation, not that night; I mean, sometime.

Q. When did he mention it to you?

A. I don't remember.

Q. Before the deliberation, at any rate? [64]

A. No, I think he said that while we were in the room when other questions came about.

Q. In the deliberation room? A. Yes.

Mr. Hoddick: Objection. Mr. Clark, you are not to discuss here anything that took place after the court room was locked, and no question was supposed to be asked. I move that the answer be stricken.

The Court: It may go out. You shouldn't have asked anything about what happened after the jury started its deliberations.

Mr. Ahrens: I didn't believe my question was directed as to what went on in the jury room,

(Testimony of Herbert A. Clark.)

merely as to when he found out Mr. Parish was a member of the reserve police organization. He volunteered the information that it was in the jury room.

The Court: But your question was narrowed down sufficiently, and besides that, Mr. Ahrens, you are here on the basis of the telephone call.

Mr. Ahrens: Yes, sir.

The Court: All right, let's stick to that.

Q. (By Mr. Ahrens): What purpose did you have in discussing this 'phone call with Mr. Parish?

A. I can't say. It was after deliberation.

Q. Weren't you outside—I am talking about the time [65] you were outside, before the deliberation, when you were worried about making this 'phone call.

A. Oh, yes. It was just something that came to my mind, I wanted to make a 'phone call.

The Court: May I clear that up. After the Court finished its instructions, the Court asked the jury to step outside while I heard the lawyers on a point of law.

The Witness: Yes.

The Court: That period of time is not covered by this prohibition against your testifying. It is only after the doors were locked and the twelve and only twelve jurors were in here alone deliberating that you cannot testify. So, as I understand him, it was during that time after instructions and before being given to the charge of the Marshal and

(Testimony of Herbert A. Clark.)

his deputy that he spoke to Peter in the hallway and Mr. Parish in the hallway about a telephone call. Am I right?

The Witness: Yes, sir.

Q. (By Mr. Ahrens): And Mr. Parish, you say, volunteered the information that he, too, desired to make a 'phone call?

A. Yes. I believe that it came to his mind after I just made a statement that I would like to make a 'phone call and wondered if it was permissible.

Q. Before you were in deliberations, just before the time you approached Marshal Heine, do you recall whom you were next to? [66]

A. No.

Q. You hadn't started to deliberate before you asked about this 'phone call; is that right?

A. The Judge had just walked out of the room, and everyone else. That door was shut immediately, and Marshal Heine came from this door, and the group of men were standing about the vicinity between here and the desk and just milling around. I guess I asked the question as the door was being shut; I believe Moses was standing at the door shutting the door, both the inside and the outside, and probably the transom at the same time; I don't know.

Q. Do you recall Mr. Heine's conversing with some of the jurors over in that corner (indicating)?

A. No.

Q. Just before you approached him?

(Testimony of Herbert A. Clark.)

A. There were a lot of men talking about nothing.

Q. Talking about the case?

A. No, about nothing, just a lot of jabber.

Q. Go over just once more what, approximately, was the exact question you asked Marshal Heine, to the best of your knowledge?

A. Would I be allowed to make a 'phone call.

Q. And his answer?

A. To the best of my knowledge, he said, "Yes, I think so," and then he asked Moses to accompany me to his office. [67] And I think at the same time everyone else in this room were instructed to wait till my return.

Q. By whom?           A. By the Marshal.

Q. By the Marshal?       A. Yes.

Q. So, without divulging the nature of your call, Mr. Heine said it would be all right for you to make a 'phone call?

A. I think he questioned me on what for.

Q. He did?

A. I think after he said "yes," he probably asked me why, and I probably told him. I imagine it was like that.

Q. You asked permission to make how many 'phone calls?       A. Two.

Q. What did Mr. Heine say?

A. I believe he said to make them as short as possible, if it was necessary to make the calls.

Q. You told him about—You mentioned the fact



(Testimony of Herbert A. Clark.)

that you wanted to call the garage and you wanted to call your home; is that right?

A. I believe I did. I might not have, but I believe I did, because both of those subjects were on my mind. I did want to take care of them. I didn't see anything wrong with it. [68]

Q. But you are sure he gave you permission to make both of those 'phone calls? A. Yes.

Q. And the two of you were alone at that time?

A. No, we weren't alone. We were standing right here.

Q. How close were the others?

A. Right in the same vicinity, matter of a few feet.

Q. Where was Mr. Parish?

A. I can't say. I don't remember.

Q. When Mr. Heine called Mr. Moses, do you recall what he requested of Mr. Moses, what he instructed him to do?

A. I believe he instructed Moses to accompany me, and he called me by name, Mr. Clark, so I could be allowed to make a 'phone call.

Q. Make a 'phone call?

A. I don't know whether it was a 'phone call, or two 'phone calls. I don't know whether he said one or two.

Q. Well, since that was so important to you that you make two 'phone calls, it would seem to me you would remember whether or not you got permission.

(Testimony of Herbert A. Clark.)

A. I had permission to make my 'phone calls, whether one or two I just don't know.

Q. You could have made as many as you wanted to, then?

A. No, I knew I was under a time element to get back into this room as soon as possible, because he told me to [69] make them short.

Q. So as far as you knew, the only restriction on you was time?

A. Yes, because it was just merely personal. I didn't want to take up the jury's time any more than my own, and I didn't want to divulge what I was here for, and so I made them as brief as possible to my own satisfaction.

Q. But your impression was you were allowed to make as many 'phone calls as you wanted to? You had that permission?

A. No, I didn't have permission to call San Francisco or anything like that. I was allowed to make a 'phone call, or two 'phone calls, I guess, whatever I felt necessary. In my mind I felt that I had two calls to make and I was authorized to make my 'phone calls.

Q. If you wanted to make the third, you would feel you could do that, too, wouldn't you?

A. If something came to my mind after I had been in there, I think I would have asked permission to make a 'phone call. In fact, I believe when I made my second call, I asked the gentleman sitting there if I could make the call.

(Testimony of Herbert A. Clark.)

Q. Do you recall who it was?

A. It was the other man sitting there who took a message to give to my wife.

Q. Did you ever get anything from anybody after you got back? [70]

A. After we were through and walked out into the hall, before I left this building, Marshal Heine came up to me and handed me a slip of paper, saying, "Here is a message from your wife."

The Court: Wait a minute. I was trying to get your question.

Mr. Ahrens: I asked——

The Court: Now that I got your question, let me get his answer.

The Witness: After we were through with the case and after you had given us instructions that we were through until January 4 and left this court room, out in the hallway Marshal Heine walked up to me and handed me a piece of paper, saying, "This is a message from your wife."

Q. (By Mr. Ahrens): You didn't get that message until your verdict had been rendered; is that right? A. Positive.

Q. It couldn't have been just after you got back?

A. Oh, no, the doors weren't opened after I came back in, to my knowledge.

Q. What were you and Mr. Moses discussing as you walked down the corridor towards the Marshal's office? A. Nothing. He wouldn't talk to me.

Q. You were talking to him?

(Testimony of Herbert A. Clark.)

A. I might have made a few remarks to him, but he [71] wouldn't talk to me.

Q. How about on the way back?

A. He wouldn't talk to me.

Q. When you got into the Marshal's office, what did you do? Who preceded you? Did you walk first or Mr. Moses? Who was there? What happened?

A. I can't say whether I went in the doorway first or Mr. Moses. I know he was right with me. I would have had a hard time running away if I had any motive.

Q. Did you ask anybody to call for you or did you make the call yourself?

A. I made the first call to Auto Service Garage at that time, yes.

Q. You made the first call? A. Yes.

Q. Without talking either to Mr. Moses or Mr. Clark, or the other gentleman who was there?

A. Yes. I was authorized to make a 'phone call, and I was accompanied to the 'phone. I immediately got on the 'phone. I told you what I done after that.

Q. Are you familiar with the telephone system that is employed here in the Federal Building?

A. Am I familiar with the system?

Q. Do you know how to dial a number here in the Federal Building? [72]

A. I believe—Yes, because I had made a 'phone call, I believe it is the attorney's office, back here,

(Testimony of Herbert A. Clark.)

the first day I was here. I called my office saying I would not be back to the office, and I was told then to dial "O" before making my call. That was on the first day I appeared in this building.

Q. You mentioned you had trouble getting your number, you tried three or four times to get the garage.

A. I believe it was that way.

Q. How much time do you think that took you?

A. Oh, just a matter of a few second, minutes.

Q. Was Mr. Moses and was the other gentleman in the room at the time? Were they both in the room at the time you tried three or four times to dial this first number?

A. I believe they were. I believe they were.

Q. Were they facing you, do you know?

A. I was looking down at the 'phone; I had to dial the number. In fact, I had to look up the number before I dialed it. In fact, I think I asked somebody for a 'phone book.

Q. I see. How long did that conversation take with the man down at the station, about ten minutes?

A. Oh, no, I don't believe it took that long. I of course was guilty about even making a 'phone call, knowing the other men were waiting for me in here, and I just wanted [73] to protect myself on it, so I made my call. And, naturally, he was not going to take the time to run over here with my keys. I imagine he was going home himself, and

(Testimony of Herbert A. Clark.)

he didn't want to do me that favor, so in his mind, trying to figure out where he could leave my keys after locking my car where I would be able to get them and somebody else not get them, it would take a minute, or a few minutes. I didn't time it.

Q. What was the reason you gave him for wanting the car taken care of?

A. So the valuables in my car wouldn't be stolen, knowing the garage is left unattended after 5 o'clock, I believe it is.

Q. You told him you would be late?

A. Yes, I told him I was still on jury duty.

Q. You told him you were still on jury duty?

A. Yes.

Q. Did you mention you would be out deliberating?

A. I didn't use the word "deliberating."

Q. Or locked up, or anything like that?

A. I don't think so.

Q. Tied up?

A. I told him I might be tied up and I didn't know how long; that is the reason I wanted my car locked.

Q. You were going to decide on a verdict?

A. No, I didn't say that. [74]

Q. You didn't tell him that?

A. I don't think I did.

Q. You might have?

A. No, I don't think so. I understood Judge McLaughlin's orders that we weren't to discuss this in any way, shape, or form with anyone.



(Testimony of Herbert A. Clark.)

Q. Exactly what did you tell him as to why you were going to be tied up? You must have explained it.

A. No, there was no need to explain to him why I was tied up. He was just the service station attendant. I was merely interested in locking my car up.

Q. You did tell him you were on jury duty?

A. I was still on jury duty and I was detained.

Q. What time was it that you called the garage?

A. I didn't look at my watch. In fact, I believe in my own mind I didn't expect to find anybody there. I don't know whether it was before five or after five. I believe they close at 5. I was not sure I would get anybody over there. I don't know what time it was, the exact time. I knew it was getting on in the evening and I would be tied up.

Q. Now, it is my understanding that you attempted to contact your wife by 'phone.

A. Yes. The number was busy.

Q. How many times did you call your home, or your wife's [75] number.

A. While it was busy?

Q. How many times was the line busy?

A. Maybe a couple or three times, and then I decided that I had better get back in here. That is when I decided I had better get back in here quick.

Q. You didn't ask anybody if you could make that second 'phone call, did you?

A. I don't know.

(Testimony of Herbert A. Clark.)

Q. Just went ahead and made it right away?

A. Yes. I don't know whether I did or not.

Q. While you were waiting for that connection, who was it that stuck his head in the door and told you that you were wanted?

A. Someone way up the hall here yelled, I believe.

Q. It was just a voice in the distance you heard?

A. Well, I was looking up this way, I think, while I was trying to get my number, and I don't know just how I was called to make me aware of the fact that I was needed in here as soon as possible, because that was on my mind.

Q. Do you know who came up? A. No.

Q. What was said?

A. I don't know. There was some sort of summons in some manner. [76]

Q. But it was directed to you?

A. I think someone was trying to get me in here because I was probably delaying it.

Q. Somebody wanted to talk to you and get you back here?

A. It probably was the Marshal, I don't know. I don't think anybody else could be calling me, because the jurors were instructed to stay in here. I don't imagine anybody was out in the hall but the Marshal.

Q. You were very anxious to get away as soon as possible?

A. No. No. I just had two things in mind, the

(Testimony of Herbert A. Clark.)

locking of my car and getting my wife to Church, because I knew her interest was to get there because of the Christmas songs we were training for.

Q. So you were concerned about the car and your wife and the plans you had had for the evening?

A. Not my plans, because mine are flexible. In my work they are always flexible, other than the trial.

Q. Do you recall whoever it was that you handed the 'phone to getting an answer just as you were about to leave?

A. I didn't get an answer.

Q. No. Do you recall anybody talking over that same wire just as you left and started to walk back?

A. No.

Q. So, as far as you know, other than that note you received later, there might never have been a contact with the [77] number you called?

A. I didn't know whether the call was going to be made or not. I asked—I requested it, and I believe, to my knowledge, they said they would. I might have been in too much of a hurry to get back here to have received the right answer. He might have said he couldn't make it, but I was trying to get back into the court room.

Q. And you never talked to your daughter or anybody else on that second 'phone call?

A. Yes, I did.

Q. You did?

(Testimony of Herbert A. Clark.)

A. Yes, I did; now that you mentioned it, my daughter did come on the 'phone. I told her to call her mother, and it was too lengthy, and she didn't come to the 'phone, so I left a message. That is how it was, now that you mentioned it. I had forgotten all about that part of it. My daughter is six and a half years old, and you never can tell what she is going to do.

Q. You think maybe now that I mentioned it, you might have talked to somebody else on that first call at the garage?

A. No, I am positive. I just talked to Mr. Kim, and I did talk to my daughter to get her mother to the 'phone, and since she didn't, I left. It is true.

Q. What did you say to your daughter besides "Call your mother"? [78]

A. I think I told her that I wouldn't be home.

Q. Did you tell her why? A. No.

Q. Didn't she want to talk to you?

A. Oh, she always likes to carry a conversation on the 'phone of some sort.

Q. Did she try to carry on a conversation?

A. I think she asked me to bring her something home, the normal things a child will say to a parent.

Q. You talked to her about two minutes, maybe, before—— A. I wouldn't know.

Q. How long did this whole business take from the time you left this room until the time you got back?

A. I didn't think it took more than three to five

(Testimony of Herbert A. Clark.)

minutes, but time can get away from you in a situation of that sort.

Q. Probably nearer ten, because you were getting impatient—because they were getting impatient; is that it?

A. I don't know. I was not watching the time. I am sorry.

Q. You mentioned that you dialed the garage about two or three times and that you dialed home about two or three times.

A. Yes, I did mention that.

Q. And you still say this whole transaction took only [79] about three to five minutes?

A. I believe so. It was all very fast even though there was a few busy signals, because as soon as the busy signal came on, I normally hang up a 'phone and try again.

Q. When you left and walked back, do you recall Mr. Clark's saying anything to you? That was the other gentleman sitting in Mr. Heine's office where you made the 'phone call.

A. No.

Q. No mention was made as to who called you down at the corridor or from around the door?

A. No.

Q. Did you make any inquiries as to who it was?

A. No. He may have pointed down saying somebody was calling me, or the Marshal was calling me, whoever was calling me. He may have said that, I don't know. I knew I was wanted back here as soon as possible, and a few things could slip your mind.

Mr. Ahrens: That is all.

The Court: Redirect.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Any further evidence, Mr. Hoddick?

Mr. Hoddick: No, your Honor.

The Court: Rebuttal? [80]

Mr. Ahrens: It is our contention that there were definitely some irregularities that took place, namely, the fact that Mr. Clark made the 'phone call without the permission of the Court, although he did have the permission from the Marshal; secondly, that the Marshal gave permission without any authority and without disclosing that fact to the Court or attempting to get permission from the Court. These irregularities were specific violations of the Court's instructions to Mr. Heine, in that he was instructed to see that no one talked to the jurors or the jurors talked to anyone, or discussed the case with anyone.

The Court: Excuse me. I think there is one further fact that, in all fairness, ought to be more or less stipulated between Mr. Miho and myself, and that is this: that during the time I was in chambers and waiting for the jury to announce that it had reached a verdict, or something, Mr. Miho came in and we were passing the time of day, in the course of which you mentioned you had been informed that some one of the jurors was allowed to make a telephone call, and you asked me if that



was permissible. And I said, you recall, replying to you, that it was not unusual, but it was customary for the Marshal to first ask me to allow the jurors to make 'phone calls concerning their garages and their homes, and that type of thing.

Mr. Miho: That is not quite my understanding.

The Court: Is that substantially correct?

Mr. Miho: No, that is not my understanding quite, if your Honor please. I recall that I asked you in the corridor, not in your room.

The Court: That may be.

Mr. Miho: And I asked your Honor whether you had given permission to the Marshal, or whether the Marshal had asked your permission to have any of the jurors talk on the telephone, and you told me at the time you had not given the Marshal any such permission, right in the corridor. We were both standing. I think I was on my way in to see you on that specific point.

The Court: I can't agree to that.

Mr. Miho: Your Honor told me definitely no, and you looked very puzzled, and, I thought, displeased that such a thing had happened.

The Court: I probably was, and still am—don't misunderstand me. But, anyway, you and I had some conversation about it so that on or about the time it happened you knew about it and I knew about it.

Mr. Miho: Yes, I was disturbed about it. That is the reason I asked your Honor. I was on my way to ask your Honor if you had permitted that

and your Honor told me "no" you had not permitted it.

The Court: That is right. So far as giving permission, [82] I was not asked; I didn't know anything about it until you told me about it. I don't know whether this cuts any ice or not, but it does indicate when you did become aware of it, you did bring it to the Court's attention.

Mr. Hoddick: Would Mr. Miho care to stipulate for the record where he got the information about the 'phone call?

Mr. Miho: Will you excuse us just a moment.

(Counsel confer.)

Mr. Ahrens: I thank you for your patience.

Mr. Hoddick: I wanted to ask Mr. Miho if he cared to stipulate for the record where he got the information.

Mr. Miho: I saw them. I saw them come back. I think John, or somebody, called my attention to it, saying, "One of the jurors is talking on the telephone." So I stepped out and saw him coming back. He was accompanied by the Marshal. So I was very much disturbed that such a thing could happen.

I went to the bathroom first, the lavatory first, and on the way out I was talking to Mr. Ahrens, and one of the officers, I believe Mr. Sousa or Mr. Abbey was there, Mr. Sousa, I believe, was there, and somebody told me one of the jurors was out of the jury room. It was a shock to me, and I deliberately stuck my neck out with John Ahrens,

and we saw them coming back down. I went over to your Honor's office. [83]

The Court: My point in mentioning it is: as soon as it apparently came to your attention, you did speak to me.

Mr. Miho: Yes, I wanted to do everything possible to correct any error. I was not trying to build up any mistrial grounds. If I could have done anything to prevent it, I would have done it.

The Court: Now, Mr. Ahrens.

(Argument by Counsel.)

The Court: With respect to the motion to acquit on the grounds heretofore urged during the course of the trial on two occasions, the Court adheres to the rulings made at that time.

With regard to the new grounds advanced and made part of this motion to acquit and as also serving as grounds for a new trial, I do not see any merit to any of them and accordingly deny both the motion to acquit and the motion for a new trial for the following reasons:

(1) With respect to the juror Parish, it is a fact that he was and is a member of the reserve police force. The question is: Being such, did that affect, in point of law, his disqualifications? In my opinion it did not. It might well have served, if known, as a basis for the defendant's exercising one of his peremptory challenges. The failure of the defendant's counsel to know that fact so as to have been able to exercise, if he desired, a peremptory challenge on [84] the basis of

it, came about in such a way that it cannot be held to have been responsibility of the juror. It is true that at one time Mr. Miho, counsel for the defendant, asked a general question as to whether anyone had been or was a member of the reserve police organization or some similar law enforcement organization. Whether that question was directed primarily to the twelve prospective jurors then in the box being examined on their voir dire or was to have been deemed addressed to the entire panel is ambiguous. In any event, either Mr. Parish, who was then in the back of the room, heard the question and later forgot it, or did not hear it. But, aside from that general question, it appears quite plain that with respect to the contention that much weight is to be attached to that general question, the fact remains that Counsel for the defense did not rest on that general question alone but saw fit to examine as to this specific point each juror, except Mr. Parish, on this point. And as to the prospective juror Parish, he was the only one of the twelve selected whom the defendant did not question at all. But again I repeat: The fact that Mr. Parish was a member of the reserve police force did not, as a matter of law, disqualify him from service, but at best would have served, if the information came to light, as a basis upon which the defense could, if it desired to do so, elect to exercise one of its peremptory challenges. [85]

Now, with respect to the juror Clark who, in

fact, made two telephone calls during the time that the stage was being shifted and the court room being transformed by the Marshal into a jury room, which 'phone calls were made with the Marshal's knowledge and permission and under his direct supervision, and which 'phone calls, the evidence affirmatively discloses, related, one, to making arrangements as to the security of goods in his car at a garage, and, two, with respect to his not being, in all probability, able to get home until late and thus unable to take his wife to some Church choir practice, there is no doubt in my mind but what both telephone calls were irregular. The Marshal definitely should not have allowed the man to make the 'phone calls without getting permission of the Court. But I cannot see how, in any way, these two innocent 'phone calls prejudiced this defendant; and, regardless of upon whom the burden of proof rests as to proving prejudicial error—I deem it to rest on the moving party—it is clear from all of the evidence that these two 'phone calls, though irregular and without the sanction of the Court, in no way rendered this defendant's trial unfair or injurious, for it is, in addition, amply clear that the jury had not been given the court room as a jury room until after those 'phone calls were completed. No steps had been taken by the jury to deliberate, and it was only after Mr. Clark returned to the court room that the the court room was turned over to the jury [86] by the Marshal for deliberations and

the jury put under lock and key. So, under no stretch of imagination can that instance of Mr. Clark's two 'phone calls be deemed to have in any way prejudiced the fair trial that this defendant has been accorded.

And over all, with respect to both grounds, at the time of the rendition of the verdict, not only did the Court poll the jury, but, at the request of Counsel, the Court polled each individual juror separately as to his verdict.

Thirdly, with respect to the legislative history, we are all indebted to Mr. Ahrens for getting the legislative history of this change of wording from "for" back to "from"; but, unfortunately, his industry doesn't turn up anything that helps him, but it does establish quite clearly that the change in the statute back to the word "from" was for the purpose of conforming squarely and fully with the holding of the Casey case by the United States Supreme Court, and by that decision this Court is naturally bound, since it is still devolved.

So, for the reasons recited, in my opinion there is no merit to either of the motions and they are each denied, and on the basis of each and each ground thereof you may have an exception.

Mr. Ahrens: Take an exception.

The Court: All right. Sentence tomorrow morning, [87] ten o'clock.

(Thereupon, at 3:50 p.m., December 29, 1949, an adjournment was taken until 10:00 a.m., December 30, 1949.)



Certificate

I, Lucille Hallam, Official Reporter, United States District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes as to testimony, stipulations, and rulings in hearing on motion of judgment of acquittal and alternative motion for a new trial in Criminal No. 10,256, United States of America v. Orestus Cavness, December 29, 1949, before Hon. J. Frank McLaughlin, Judge.

February 21, 1950.

/s/ LUCILLE HALLAM.

[Endorsed]: Filed February 28, 1950.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings and transcript of proceedings:

Indictment.

Affidavit and Search Warrant.

Motion for the Suppression of Evidence, Affidavit, and Notice of Motion.

Renewal of Motion of Judgment of Acquittal and Alternative Motion for a New Trial.

Judgment and Commitment.

Notice of Appeal.

Election of Defendant.

Bond.

Cost Bond.

Stipulation Extending Time to File Transcript of Record and Order Extending Time to File Transcript of Record.

Amended Designation of Record on Appeal.

Transcript of Proceedings—December 5, 7, 8, and 9, 1949; December 12, 13, and 14, 1949; and December 29, 1949.

I further certify that included in said record on appeal is a copy of the court minutes of December 5, 7, 8, 9, 12, 13, 14, 29, and 30, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of March, 1950.

[Seal]     /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii.

[Endorsed]: No. 12514. United States Court of Appeals for the Ninth Circuit. Orestus Cavness, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed March 28, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

ORESTUS CAVNESS,  
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,  
Plaintiff-Appellee.

STATEMENT OF POINTS TO BE RELIED  
UPON BY DEFENDANT-APPELLANT  
ON APPEAL.

Comes now Orestus Cavness, Defendant-Appellant in the above-entitled cause, by Fong, Miho & Choy, his attorneys, and in conformance with Rule 9 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit hereby

states that it is intended that the Defendant-Appellant shall rely upon the following points:

1. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion for the suppression of evidence.

2. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion for a new trial, which was argued on December 13, 1949.

3. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion for judgment of acquittal.

4. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's alternative motion for a new trial.

5. By reason of said errors and other manifest errors appearing in the record designated herein, the judgment of conviction should be set aside.

Dated this 25th day of March, A.D., at Honolulu, Territory of Hawaii.

ORESTUS CAVNESS,  
Defendant-Appellant.

By FONG, MIHO & CHOY,  
His Attorneys.

By /s/ WALTER G. CHUCK.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE  
PRINTED ON APPEAL

Comes now Orestus Cavness, Defendant-Appellant in the above-entitled cause, by Fong, Miho & Choy, his attorneys, and hereby designates for inclusion in the printed record on appeal the following:

1. Indictment filed September 15, 1949.
2. Affidavit and Search Warrant.
3. Clerk's Minutes of December 5, 7, 8, 9, 12, 13, 14, 29 and 30, 1949.
4. Official Reporter's Transcript of Evidence Taken and Proceedings had during the Trial.
5. Defendant's Motion for the Suppression of Evidence and Affidavit filed on December 5, 1949, in Open Court.
6. Official Reporter's Transcript of all Testimony Relative to the Affidavit on which the Search Warrant was based, taken during the hearing on the Motion for Suppression of Evidence.
7. Renewal of Motion of Judgment of Acquittal and Alternative Motion for New Trial filed on December 19, 1949.
8. Clerk's Minutes of December 29, 1949.
9. Official Reporter's Transcript of Testimony taken on December 29, 1949.
10. Judgment, Commitment and Sentence of the Court.

11. Notice of Appeal filed on January 9, 1950.
12. Election of Defendant filed on January 9, 1950.
13. Bond filed on January 9, 1950.
14. Cost Bond filed on January 20, 1950.
15. Amended Designation of Record on Appeal filed on January 25, 1950.
16. Defendant's Statement of Points to Be Relied Upon Appeal.
17. This Designation of Record to be Printed on Appeal.

Dated at Honolulu, T. H., this 25th day of March, A.D., 1950.

ORESTUS CAVNESS,  
Defendant-Appellant,  
By FONG, MIHO & CHOY,  
His Attorneys.

By /s/ WALTER G. CHUCK.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.